No. ____

IN THE

Supreme Court of the United States

IN RE: NYREE BELTON, *Debtor*.

GE CAPITAL RETAIL BANK,

Petitioner,

v.

NYREE BELTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether provisions of the Bankruptcy Code providing for a statutorily enforceable discharge of a debtor's debts impliedly repeal the Federal Arbitration Act, 9 U.S.C. § 1 et seq.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner discloses the following: Petitioner GE Capital Retail Bank ("GECRB") is now known as Synchrony Bank. Synchrony Bank is a wholly owned subsidiary of Synchrony Financial. Synchrony Financial is a publicly traded corporation and is not aware of any publicly traded corporation that owns ten (10) percent or more of its publicly traded shares.

The petitioner is GE Capital Retail Bank.

The respondent is Nyree Belton.

In the proceedings below this matter was consolidated with *Citigroup Inc. et al. v. Bruce (In re Bruce)*, No. 19-0655 (2d Cir.). The appellants in the consolidated proceedings below were GE Capital Retail Bank; Citigroup Inc.; and Citibank N.A. The appellees in the consolidated proceedings below were Nyree Belton and Kimberly Bruce.

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PETITION FOR A WRIT OF CERTIORARI

GE Capital Retail Bank ("GECRB") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Belton v. GE Capital Retail Bank (In re Belton)*, 961 F.3d 612 (2d Cir. 2020) and is reproduced in the Appendix attached hereto at Pet. App. 1a-12a. The bankruptcy court's November 10, 2014 bench ruling on respondent's motion to compel arbitration is unreported and is reproduced at Pet. App. 48a-78a. The October 14, 2015 order of the district court reversing the bankruptcy court's order is unreported and reproduced at Pet. App. 25a-47a. The district court's March 4, 2019 order granting reconsideration, vacating the earlier district court order, and denying the motion to compel is unreported and reproduced at Pet. App. 13a-24a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its final judgment on June 16, 2020. By Order dated March 19, 2020, this Court provided that "[i]n light of the ongoing public health concerns relating to COVID-19 . . . the deadline to file any petition for a writ of certiorari due on or after [March 19, 2020] . . . is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or denying a timely petition for rehearing." This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of 9 U.S.C. provides, in relevant part: "A written provision in . . . a contract evidencing . . . an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 4 of 9 U.S.C. provides, in relevant part: "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

Section 105(a) of 11 U.S.C. provides, in relevant part: "The court may issue any order . . . necessary or appropriate to carry out the provisions of this title."

Section 524(a)(2) of 11 U.S.C. provides, in relevant part:

"A discharge in a case under this title—

. . .

> "(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]"

INTRODUCTION

"In many cases over many years, this Court has heard . . . efforts to conjure conflicts between the Arbitration Act [FAA] and other federal statutes." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018). Those efforts have not met with success: "this Court has rejected *every* such effort to date." *Id.* (emphasis in original). Instead, in an unbroken line of precedent, this Court has held that the FAA and other federal statutes must be read "harmonious[ly]" such that only an "irreconcilable conflict" between two statutes that is "clear and manifest" would justify not giving effect to the FAA's "command" of arbitration. *Id.* at 1619, 1624 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

In this case, the Second Circuit took the path that *Epic* and its predecessors rejected. The court of appeals held that the Bankruptcy Code's discharge provision impliedly repeals the FAA's mandate of arbitrability. Rather than look for manifest evidence of an irreconcilable conflict, the Second Circuit engaged in an atextual and amorphous purpose-focused inquiry in which it weighed the values it believed the FAA and the Code respectively served. In finding a conflict, the Second Circuit added to a growing body of lower court law that has treated the arbitrability of bankruptcy-related disputes as an island unto itself amidst this Court's arbitration jurisprudence. These cases employ a far lower threshold for finding an implied repeal of the FAA than what this Court has required.

At issue below was respondent's statutory claim, brought on behalf of a putative class of debtors, that GECRB sought to collect a discharged debt in violation

of § 524(a)(2) of the Code—a dispute that was otherwise arbitrable under the parties' agreement and the FAA. The Second Circuit acknowledged that there was no hint in the Code's text that Congress intended to make such disputes non-arbitrable, but it held that silence signaled "ambigu[ity]." Pet. App. 8a. At that point, the court engaged in an attempt to divine the purpose of the Bankruptcy Code. Invoking pre-*Epic* circuit precedent that it concluded was still binding, the court held that there was an inherent conflict between the Code and the FAA because of the importance the Code places upon providing a fresh start to debtors. Pet. App. 6a-9a. The court made clear that had it been "writing on a blank slate" it might have come out the other way, but that it was obligated to adhere to the purpose-driven approach taken by its earlier case, which it held survived *Epic*. Pet. App. 3a.

The Second Circuit's decision conflicts with *Epic* and other prior decisions of this Court, it is wrong, and it is worthy of this Court's review. There is no indication in the Bankruptcy Code, let alone clear and manifest evidence, that Congress intended to displace arbitration for disputes regarding the discharge statute. Those disputes are important and recurring, but they are just as amenable to resolution in arbitration as they are in the federal and state courts where they are routinely heard.

The Second Circuit justified its atextual approach by invoking this Court's statement in *Shearson/American Express, Inc. v. McMahon* that "congressional intent" "may be deduced from 'the statute's text or legislative history, *or* from an inherent conflict between arbitration

and the statute's underlying purposes.'" Pet. App. 5a-6a (quoting 482 U.S. 220, 227 (1987) (emphasis added)). But this Court has never said that the absence of textual support is irrelevant or merely a neutral factor. It has said precisely the opposite. Indeed, looking solely to perceived purpose gives rise to the dangers the Court warned of in *Epic*: "Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*." *Epic Sys. Corp.*, 138 S. Ct. at 1624; *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) (rejecting atextual purposive interpretation because: "After all, only the words on the page constitute the law adopted by Congress.").

The Second Circuit's error is illustrative of a larger confusion among the circuits, which employ different tests to determine whether the Code repeals the FAA. Like the decision below, many of these tests accord arbitration second-class status relative to the Code. Review is thus warranted to reaffirm there is not one rule to determine the arbitrability of bankruptcy-related claims, and another for all other federal claims. Absent a "clear and manifest congressional command to displace the Arbitration Act," there is no "irreconcilable conflict[,]" and arbitration agreements should be enforced according to the terms of the FAA. *Epic Sys. Corp.*, 138 S. Ct. at 1624.

The petition should be granted.

STATEMENT OF THE CASE

A. Respondent's Arbitrable Dispute With GECRB.

Respondent opened a credit card account with GECRB in October 2007 and agreed to arbitrate "any" claim relating to the account. JA45, JA47.[1] After respondent did not repay her debt to GECRB, GECRB sold the debt to a third party and informed the credit reporting agencies of the sale. JA48-49. Respondent subsequently filed a chapter 7 petition. JA126. Respondent listed GECRB as a former creditor for "[n]otice [o]nly" and stated no amount owed for the account. *See In re Belton*, No. 12-23037 (Bankr. S.D.N.Y.), ECF No. 1 at 17. Respondent's chapter 7 case was successfully completed and her case was closed in September 2012. JA126.

Over a year later, in April 2014, respondent moved to reopen her bankruptcy case and subsequently filed a class action adversary proceeding against GECRB. Pet. App. 28a; JA122. Respondent alleged her credit report entry for GECRB's sale of the debt was inaccurate because it did not note her subsequent bankruptcy. She further alleged that omission violated § 524(a)(2)'s prohibition on acts to collect a discharged debt. Respondent seeks to hold GECRB in contempt for violating § 524(a)(2), and to obtain a monetary recovery on behalf of the putative class with respect to every bankruptcy since the middle of 2007 where the debtor

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[1] All "JA_" references refer to the Joint Appendix filed in *Belton v. GE Capital Retail Bank (In re Belton)*, 961 F.3d 612 (2020) (No. 19-0648), ECF No. 28-29.

has a credit report and GECRB sold a debt owed by the debtor prior to the bankruptcy. JA137; *see* Pet. App. 28a-29a. Respondent styled her claim as seeking relief under § 105 of the Code, which permits a court to issue "any order . . . that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

B. The Bankruptcy Court Refuses To Compel Arbitration And The District Court Initially Reverses.

GECRB moved to compel arbitration pursuant to the parties' arbitration agreement. *See* Pet. App. 53a. The bankruptcy court acknowledged that GECRB's arbitration provision covered the dispute at issue, but denied the motion to compel because it found "implicit[]" "policy conflicts" between the FAA and the Bankruptcy Code. *See* Pet. App. 64a-65a, 78a. In the bankruptcy court's view, the FAA was displaced because "discharge and its related fresh start" were the "policy [which] underlies the Bankruptcy Code." Pet. App. 69a. The bankruptcy court stayed the litigation pending appeal.

GECRB appealed to the district court, which reversed. The district court acknowledged that, though the relevant statutes do not expressly discuss arbitration, "text and legislative history weigh against the conclusion that Congress intended to preclude arbitration of Section 524 claims," and noted that federal district courts do not have exclusive jurisdiction over bankruptcy-related civil claims. Pet. App. 37a-39a.

The district court also rejected the notion of an inherent conflict between the FAA and the relevant

provision of the Bankruptcy Code. The court explained that alleging a violation of a "fundamental" bankruptcy provision such as the debtor's "fresh start" "is not enough to exempt such a claim from arbitration." Pet. App. 40a.

C. The Second Circuit's Decision In *Anderson v. Credit One Bank*.

On March 7, 2018, the Second Circuit decided *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382 (2d Cir. 2018). The plaintiff in *Anderson* had raised a substantially similar claim to respondent's (and was represented by the same counsel) in front of the same bankruptcy judge who heard respondent's case. Also like this case, the plaintiff in *Anderson* sought money damages based on § 524(a)(2) claims. *See Credit One Fin. v. Anderson (In re Anderson)*, 550 B.R. 228, 237 (S.D.N.Y. 2016). The bankruptcy court again denied a motion to compel arbitration and was affirmed by a different district court. *See Anderson*, 884 F.3d at 385-86.

On appeal to the Second Circuit, that court found that neither party had addressed whether the text or legislative history indicated any congressional intent to preclude arbitration of § 524(a)(2) disputes at earlier levels of the proceedings. *Id.* at 388-89. In that unusual posture, the Second Circuit declined to address those arguments, and "only consider[ed] whether there is an 'inherent conflict between arbitration' and the Bankruptcy Code." *Id.* at 389 (quoting *McMahon*, 482 U.S. at 227).

Specifically, the Second Circuit, relying on this Court's decision in *McMahon*, held that "an inherent conflict between arbitration and the statute's underlying purposes" was sufficient to reveal congressional intent to override arbitration. *Id.* at 388 ("Congressional intent may be discerned through the 'text or legislative history, *or* from an inherent conflict between arbitration and the statute's underlying purposes.'" (quoting *McMahon*, 482 U.S. at 227 (emphasis added))). *Anderson* inferred such a conflict because "1) the discharge injunction is integral to the bankruptcy court's ability to provide debtors with the fresh start that is the very purpose of the Code; 2) the claim regards an ongoing bankruptcy matter that requires continuing court supervision; and 3) the equitable powers of the bankruptcy court to enforce its own injunctions are central to the structure of the Code." *Id.* at 390.

Because it determined that an inherent conflict existed between the Bankruptcy Code and the FAA, the *Anderson* court held that the bankruptcy court had appropriately exercised its "discretion" to refuse to compel arbitration. *Id.* at 388, 392.

D. This Court Decides *Epic Systems v. Lewis*.

Shortly after *Anderson*, this Court decided *Epic Systems Corp. v. Lewis*. There, this Court reiterated that "[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." 138 S. Ct. 1612, 1624 (2018) (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)). This Court reaffirmed that the

congressional intention must be "clear and manifest," *id.* (quoting *Morton*, 417 U.S. at 551), and that the conflict with the FAA must be "irreconcilable," *id.*

As discussed in more detail below, *Epic* held that the National Labor Relations Act ("NLRA") does not "offer[] a conflicting command" to override the FAA. *Id.* at 1619. The Court emphasized that "the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act." *Id.* at 1627. The Court noted that it had "rejected *every* such effort" to "conjure conflicts between the Arbitration Act and other federal statutes." *Id.*

E. The District Court Vacates Its Order Compelling Arbitration In Light Of *Anderson*, And The Second Circuit Affirms.

Meanwhile, following *Anderson*, respondent moved for reconsideration in the district court. *See* Pet. App. 19a-23a. Respondent contended that because *Anderson* definitively determined that there was an inherent conflict as to purpose, the text and legislative history of the Code and the FAA were irrelevant to arbitrability. *See* Pet. App. 22a. The district court agreed and reversed its order compelling arbitration. Pet. App. 23a.

On appeal, the Second Circuit affirmed. Although the court acknowledged that "[i]f we were writing on a blank slate, perhaps our conclusion would be different," Pet. App. 3a, it held *Anderson* was still good law after *Epic*, and that a statute's purpose alone could reveal an inherent conflict with the FAA, even when the text was "silent on the issue of arbitration" and thus merely

"ambiguous." Pet. App. 8a. Applying this principle, the court held that the importance of the Code's fresh start provisions impliedly conflicted with the FAA's command of arbitrability. Pet. App. 6a-8a. The Second Circuit acknowledged that Congress had not granted exclusive jurisdiction to federal courts to hear such disputes, and that state courts routinely resolved claims about what constituted an unlawful attempt to collect a debt under § 524(a)(2). Pet. App. 9a. But it concluded that the availability of state court relief did not support arbitrability because respondent had styled her claim as one for contempt. Pet. App. 9a-10a.

On remand, the bankruptcy court reaffirmed that it would leave its stay in place pending review by this Court. Tr. of Proceedings at 6-7, 27, *Belton v. GE Capital Consumer Lending*, Adv. No. 14-08223 (Bankr. S.D.N.Y. Sept. 17, 2020), ECF No. 125. The bankruptcy court noted it had always thought it a "close" question as to whether the parties' dispute was arbitrable. *Id.* at 25.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With This Court's Clear Precedent Regarding The Scope Of The FAA.

A. *Epic* Requires That Congressional Intent To Displace Arbitration Must Be "Clear And Manifest."

The FAA directs courts to "treat arbitration agreements as "valid, irrevocable, and enforceable." *Epic Sys. Corp.*, 138 S. Ct. at 1621 (quoting 9 U.S.C. § 2). Just over two years ago, *Epic* reiterated that this Court will not construe another federal statute to repeal the

FAA's express command of arbitrability absent "clear and manifest" evidence Congress intended that result. *Id.* at 1624 (quoting *Morton*, 417 U.S. at 551). The Court explained that "we come armed with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." *Id.* (quoting *United States v. Fausto*, 484 U.S. 439, 452, 453 (1988)). That presumption reflects "[r]espect for Congress as drafter" and guards against courts "pick[ing] and choos[ing] between statutes." *Id.* Summing up the standard, the Court held that a litigant who contends that another enactment cannot be harmonized with the FAA faces a "heavy burden" to establish an "irreconcilable conflict[]" between the laws. *Id.*

The Court then applied that standard and held that the plaintiffs did not carry their "heavy burden" to identify an "irreconcilable conflict[]" between the FAA and the NLRA. *See id.* at 1624, 1632. The plaintiffs' claim failed in large part because the NLRA said nothing about arbitration at all. As the Court explained, the NLRA's text "does not express approval or disapproval of arbitration." *Id.* at 1624. Given that the statute "does not even hint at a wish to displace the Arbitration Act" it does not "accomplish that much clearly and manifestly, as our precedents demand." *Id.*

The Court contrasted the NLRA's silence on arbitration with language in statutes where Congress had overridden the FAA. For example, 7 U.S.C. § 26(n)(2) provides that "[n]o predispute arbitration agreement shall be valid or enforceable" under certain

circumstances and 15 U.S.C. § 1226(a)(2) provides that "[n]otwithstanding any other provision of law, . . . arbitration may be used to settle [motor vehicle contract disputes] only if" certain conditions are met. *See Epic Sys. Corp.*, 138 S. Ct. at 1626. These express provisions show that Congress "knows how to override the Arbitration Act when it wishes" and that "[t]he fact that we have nothing like that here is further evidence" that Congress did not intend to override the FAA via the NLRA. *Id.*

Epic also discussed at length the role that statutory purpose plays (and does not play) in determining whether there is an irreconcilable conflict between federal statutes. The majority did not gainsay that the NLRA serves important policy goals: "safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining." *Id.* at 1630 (quoting *id.* at 1636 (Ginsburg, J., dissenting)). And it recognized that the statute giving rise to the plaintiff's actual claims, the Fair Labor Standards Act, allows for judicial resolution of disputes. *Id.* at 1626. But the Court rejected the inference that by making a judicial forum available to vindicate a federal right, Congress silently intended to displace the FAA. Instead, the key point in the analysis was that nothing in the statute showed a "clear and manifest congressional command" to prohibit arbitration as a means of serving those polices. *Id.* at 1624. *See id.* at 1627 ("[E]ven a statute's express provision for collective legal actions does not necessarily mean that it precludes 'individual attempts at conciliation' through arbitration." (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991))).

B. *Epic* Stands Atop A Mountain Of Precedent Affirming That The Importance Of A Policy Goal Does Not Displace The Federal Arbitration Act.

Epic was not a bolt from the blue. For decades, the Court has held that absent a "clear" statement from Congress, the Court will not find that another federal statute curtails the scope of the FAA. *Id.* at 1624; *see, e.g.*, *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Indeed, as *Epic* explained, this Court has "rejected *every* . . . effort" to find a conflict between the FAA and another federal statute. *Epic Sys. Corp.*, 138 S. Ct. at 1627 (emphasis in original).

The Court's cases have been particularly clear: a federal statute does not displace the FAA simply because that statute serves important values. Time and again, this Court has rejected those arguments, finding them insufficient to show an irreconcilable conflict that overcomes the strong federal policy favoring enforcement of arbitration agreements.

For example, in *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, the Court rejected the argument that the "fundamental importance" of the antitrust laws displaced the FAA, because "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the [antitrust] statute will continue to serve both its remedial and

deterrent function." 473 U.S. at 634, 637. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court found no "inherent inconsistency between" arbitration and the "important social policies" underpinning the Age Discrimination in Employment Act. 500 U.S. at 27-28.

And in *Green Tree Financial Corp.–Alabama v. Randolph*, the Court again emphasized that "even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions." 531 U.S. 79, 90 (2000) (quoting *Gilmer*, 500 U.S. at 28). In that case, there was no evidence that the plaintiff asserting claims under the Truth in Lending Act and the Equal Credit Opportunity Act would be "unable to vindicate her statutory rights in arbitration." *Id.* at 83, 90-91.

Even in *McMahon*, on which the court below relied, this Court explained that, when "text and legislative history fail to reveal any intent to override the provisions of the [FAA]," any conflict between the relevant statute and the FAA must be "irreconcilable." 482 U.S. at 239. There, the Court held that the plaintiffs' civil RICO claims—as well as securities claims—were arbitrable, notwithstanding the important "deterrent" and "remedial" interests of the statutes because there was no reason to think plaintiffs would be unable to "vindicate [their] statutory cause of action in the arbitral forum." *Id.* at 240 (quoting *Mitsubishi Motors*, 473 U.S. at 637), 242; *see id.* at 238.

In short, the Court's arbitration cases have taught a consistent lesson: the importance of a federal right does

not generate the "irreconcilable conflict" necessary to displace the FAA's command of arbitration. On the contrary, this Court has consistently held that arbitration is capable of vindicating those important federal rights.

C. The Decision Below Spurns The Court's Precedent Requiring A "Clear And Manifest Congressional Command."

The decision below holds that § 524(a)(2) of the Bankruptcy Code impliedly displaces the FAA's command that arbitration agreements "shall be enforced," *see* 9 U.S.C. § 2, and instead gives a court "discretion" to decline to enforce those agreements, *see Anderson*, 884 F.3d at 387-88. Pet. App. 7a-10a. That decision cannot be squared with this Court's precedents.

The Second Circuit began in the right place by looking to the text of § 524(a), but it went badly astray from there. Section 524(a)(2) provides that a discharge under the Code "operates as an injunction against . . . an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2). This prohibition contains no enforcement mechanism, but respondent sought relief through § 105 of the Code, which authorizes the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *Id.* § 105(a).

The court acknowledged that "the Code is silent on the issue of arbitration" in the context of a dispute about whether there has been an attempt to collect a debt

within the meaning of § 524(a)(2), but it took that silence to establish "ambigu[ity]" as to Congress's intentions. Pet. App. 8a-9a. Yet *Epic* teaches precisely the opposite lesson: the Code's silence regarding arbitration is not a neutral factor that generates statutory ambiguity but "telling" evidence that Congress did *not* intend to displace the FAA. *See Epic Sys. Corp.*, 138 S. Ct. at 1626-27. Where a federal enactment "does not even hint at a wish to displace the Arbitration Act" it surely does not "accomplish that much clearly and manifestly, as our precedents demand." *Id.* at 1624.

The panel here suggested that it would work a radical change in this Court's precedents to require textual support to justify a claim of inherent conflict with the FAA, *see* Pet. App. 7a-8a, but the opposite is true. An atextual inherent conflict is a chimera in the U.S. Reports. The Court has never found one. And *Epic* made clear that only "clear and manifest" evidence of intent would suffice to demonstrate that conflict, and that any such conflict would have to be "irreconcilable" to warrant a conclusion that Congress intended to repeal the FAA in a later statute. Such unmistakable evidence of an irreconcilable conflict is lacking where it has no support in the text of the statute.

With no textual support for an irreconcilable conflict, the Second Circuit should have ended its analysis there. But, having perceived an open door in the Code's text, it proceeded to analyze the purpose of § 524(a)(2) and found that the provision was in "inherent conflict" with the FAA's command of arbitration. *See* Pet. App. 7a-10a.

Here, the court made the same error that this Court has been calling out for decades in other areas of federal law: conflating the importance of the federal right with an irreconcilable conflict with the FAA. The Second Circuit cited three features of the Code that it determined created a conflict with the FAA:

> (1) the discharge injunction is "integral" to the bankruptcy process; (2) "the claim [concerns] an ongoing bankruptcy matter that requires continuing court supervision;" and (3) "the equitable powers of the bankruptcy court to enforce its own injunctions are central to the structure of the Code."

Pet. App. 6a (quoting *Anderson*, 884 F.3d at 390).

No aspect of this purposive analysis, whether singly or in combination, remotely demonstrates an irreconcilable conflict with the FAA. In the first place, as described above, the fact that a statute is important or integral is not a basis upon which to avoid arbitration. No one disputes that the fresh start is integral to the Code or that 524(a)(2)'s injunction against acts to collect a debt should be respected. But the Court's cases require that courts not ask merely whether a fresh start is important, but whether the relevant federal statute and the FAA are "irreconcilable" *Epic Sys. Corp.*, 138 S. Ct. at 1624. There is no basis to conclude that the fresh start policy is somehow *more* in conflict with arbitration than the federal policies of ensuring workers' rights to collective action and to protection under wage and hour laws, *see id.* at 1630; preventing age discrimination, *see Gilmer*, 500 U.S. at 27-28; or enforcing the antitrust,

securities, or racketeering laws, *see Mitsubishi Motors*, 473 U.S. at 634, 636-37; *McMahon*, 482 U.S. at 222, 231-32, 240.

Likewise, the court doubly misses the mark to assert that the bankruptcy court's "ongoing" power to enforce its "own injunctions" is in irreconcilable conflict with the FAA. For one thing, it is routine for parties to arbitrate the meaning of a court order. *See, e.g., AKZO Nobel Coatings Inc. v. Color & Equip. LLC*, No. 2:11-CV-00082, 2012 WL 12960780, at *4 (N.D. Ala. July 16, 2012) ("An arbitrator should have no problem interpreting the court's Preliminary Injunction Order."). For another, the underlying dispute here is not about the interpretation of the language of the bankruptcy court's order, but about the language of a statutory prohibition on the collection of debts. A discharge order puts that language at issue by operation of law. 11 U.S.C. § 524(a)(2) (stating that "[a] discharge in a case under this title (2) operates as an injunction against [an explicit list of items]"). The parties' dispute is thus not about what the bankruptcy judge meant, but what *Congress* meant. Arbitration is a perfectly suitable means of determining the scope of federal rights between two parties here as it is with respect to all other federal rights.

Nor is it any answer to advert to the bankruptcy court's "equitable powers" because those equitable powers end where the express text of a statute begins. *See Law v. Siegel*, 571 U.S. 415, 421 (2014) ("[I]n exercising [its] statutory and inherent powers, a bankruptcy court may not contravene specific statutory provisions."). The FAA's express command of

arbitrability cannot be overcome by an exercise of implied equitable power.

Finally, further confirmation that the scope of § 524(a)(2) is not within the special purview of bankruptcy courts comes from Congress's decision to give state courts concurrent jurisdiction over such disputes. 28 U.S.C. §1334(b); *see Taggart v. Lorenzen*, 139 S. Ct. 1795, 1803 (2019) (state courts "have concurrent jurisdiction" over questions of dischargeability). State courts routinely resolve disputes arising out of discharge orders. *See, e.g.*, *Flanders v. Lawrence (In re Flanders)*, 657 F. App'x 808, 821 (10th Cir. 2016) (state court's interpretation of bankruptcy discharge order was entitled to preclusive effect). Indeed, this Court has observed that "in most instances" disputes over the dischargeability of a debt are resolved in state court not bankruptcy court. *Taggart*, 139 S. Ct. at 1803 (quoting advisory committee's 2010 note on subd. (c)(1) of Fed. R. Civ. P. 8). If state courts are competent to resolve these disputes there is no reason—let alone a clear and manifest one—to conclude that arbitration is inherently in conflict with the Code.

II. This Court's Review Is Needed To Resolve Persistent Confusion In The Lower Courts Regarding The Bankruptcy Code's Ability To Displace The Federal Arbitration Act.

This case is the latest illustration of the lower courts' confusion about how the Bankruptcy Code and the FAA interact. Different circuits employ different tests to determine whether the Code repeals the FAA. That divergence is worthy of the Court's review by itself. As one scholarly article summed up the issue,

"[i]nterpretation [of *McMahon*] has not been uniform [in the bankruptcy context] . . . , and the circuit courts interpreting the Supreme Court holding have emphasized the importance of different considerations and have reached different outcomes." Alexis Leventhal & Roni A. Elias, *Competing Efficiencies: The Problem of Whether and When to Refer Disputes to Arbitration in Bankruptcy Cases*, 24 Am. Bankr. Inst. L. Rev. 133, 144 (2016); *see also* Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 Am. Bankr. Inst. L. Rev. 183, 185 (2007) (concluding that the "numerous approaches and analyses adopted by the various federal courts of appeals" have led to substantial "uncertainty and confusion . . . with respect to the interplay between arbitration and bankruptcy and whether an arbitration clause should be enforced in a particular proceeding in a bankruptcy case").

Equally problematic is that the mass of different tests employed by the lower courts bear little resemblance to the approach this Court has set out in its arbitration cases. Rather than assess whether Congress has clearly and manifestly indicated its intent to repeal such that there is an irreconcilable conflict between the FAA and the Code, the lower courts are instead relying on purpose-based assessments of the particular Code provision at issue. There should not be one test for assessing whether the Code and the FAA can be harmonized, and another for the rest of federal law.

To begin, the courts of appeals are openly using different tests in determining when the Code repeals the FAA. One group of circuits, including the Second Circuit, look to whether the claim at issue is core or non-

core. The Second Circuit instructs that a non-core claim "generally" may be arbitrated under the FAA, while a core claim may not. *See Anderson*, 884 F.3d at 387 (quoting *Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.)*, 226 F.3d 160, 166 (2d Cir. 2000)). The Fourth, Ninth, and Eleventh Circuits similarly distinguish between core and non-core proceedings. *Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co.)*, 403 F.3d 164, 169 (4th Cir. 2005) (examining whether "Congress intended to limit or preclude the waiver of the bankruptcy forum for core proceedings"); *Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1021 (9th Cir. 2012) (noting that a bankruptcy court has "discretion" to deny arbitration in core proceedings, but generally not in non-core proceedings); *Whiting–Turner Contracting Co. v. Elec. Mach. Enters., Inc., (In re Elec. Mach. Enters., Inc.)*, 479 F.3d 791, 796-97 (11th Cir. 2007) (same).

The Fifth Circuit takes a different—albeit related—tack, asking whether the proceeding "adjudicate[s] statutory rights conferred by the Bankruptcy Code and not the debtor's prepetition legal or equitable rights." *Matter of Henry*, 944 F.3d 587, 590-91 (5th Cir. 2019) (finding, after *Epic*, that a claim for violating the discharge injunction was not arbitrable because of an inherent conflict with the FAA). If this first requirement is met, the court then asks whether "requiring arbitration would conflict with the purposes of the Bankruptcy Code." *Id.* at 591.

The Third Circuit rejects the core/non-core distinction. *See In re Mintze*, 434 F.3d 222, 229 (3d Cir.

2006) ("The core/non-core distinction does not, however, affect whether a bankruptcy court has the discretion to deny enforcement of an arbitration agreement."). That court's articulated rule comes the closest to the analysis mandated by *Epic*, setting the task to "determine whether [a party] has established congressional intent to preclude waiver of judicial remedies for the statutory rights at issue." *Id.* at 231.

The result is an inconsistent patchwork of bankruptcy proceedings which apparently pose a conflict with the FAA. Debtors in the Second Circuit can be required to arbitrate alleged willful violations of the Bankruptcy Code's automatic stay, *see MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 110-11 (2d Cir. 2006), but not alleged violations of the statutory discharge injunction. Pet. App. 3a. Litigants in the Third Circuit can arbitrate complaints to enforce rescission of loan agreements, *see In re Mintze*, 434 F.3d at 226, while those in the Ninth Circuit lose the benefit of their bargain for pre-petition claims for breach of contract, fraud, and breach of fiduciary duty. *See Ackerman v. Eber (In re Eber)*, 687 F.3d 1123, 1125-26 (9th Cir. 2012). Some claims that would otherwise be arbitrable may not be sent to arbitration if the proceeding also concerns bankruptcy causes of action that "predominate." *Cf. Gandy v. Gandy (In re Gandy)*, 299 F.3d 489, 497-99 (5th Cir. 2002) (Even though some claims involved "pre-petition legal or equitable rights," the goal of avoiding bifurcated proceedings "*could* present the type of conflict with the purposes and provisions of the Bankruptcy Code that *may* override the FAA's

statutory directive of enforcement of arbitration agreements." (emphasis added)).

Among these differing approaches, however, one common thread emerges: contrary to this Court's teachings, the lower courts are determining whether the Code repeals the FAA by attempting to ascertain the purpose of the Code provision, divorced from any assessment of whether the text of the Code actually irreconcilably conflicts with the FAA. That of course is what the Second Circuit did here. *See* Pet. App. 6a-9a. But the Second Circuit is hardly alone. *E.g.*, *Matter of Henry*, 944 F.3d at 591 ("[B]ankruptcy courts may decline enforcement of arbitration agreements only if requiring arbitration would conflict with the purposes of the Bankruptcy Code."); *In re White Mountain Mining Co.*, 403 F.3d at 169 ("We need not decide today whether the statutory text itself demonstrates congressional intent to override arbitration for core claims because this case may be decided under *McMahon*'s third line of analysis[.] . . . We thus turn to whether there is an inherent conflict between arbitration and the underlying purposes of the bankruptcy laws."); *In re Thorpe Insulation Co.*, 671 F.3d at 1021 ("[A] bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision only if arbitration would conflict with the underlying purposes of the Bankruptcy Code."); *In re Elec. Mach. Enters., Inc.*, 479 F.3d at 796 ("[W]e find no evidence within the text or in the legislative history that Congress intended to create an exception to the FAA in the Bankruptcy Code. Therefore, we look to the third factor of the *McMahon* test and examine whether an inherent conflict exists

between arbitration and the underlying purposes of the Bankruptcy Code." (internal citation omitted)).

Even the Third Circuit overemphasizes the purpose of the Bankruptcy Code. That court has acknowledged that there was "no evidence of [congressional] intent [to displace the FAA] in either the statutory text or the legislative history of the Bankruptcy Code." *In re Mintze*, 434 F.3d at 231. Yet, when evaluating whether there was an inherent conflict between the FAA and the Bankruptcy Code for a claim "to enforce a pre-petition rescission of [a] loan agreement," *id.* at 226, that court placed no weight on that important textual fact. *Id.* at 231. The court instead determined that there was no conflict with "the underlying purposes of the Bankruptcy Code" because there was "no bankruptcy issue to be decided by the Bankruptcy Court." *Id.* at 231-32.

Thus, like the Second Circuit, many other courts of appeals have constructed ways to inflate the concept of an "inherent conflict" to encompass a variety of claims that intersect with the purposes of the Bankruptcy Code. But *Epic* teaches that for a conflict to be inherent, the statutes must be "irreconcilable." *See Epic Sys. Corp.*, 138 S. Ct. at 1624.

There should not be varying sets of amorphous rules governing the arbitrability of bankruptcy claims, and another unified set of rules governing the arbitrability of all other federal claims. Only this Court can ensure that bankruptcy law is no longer an exception to this Court's arbitration jurisprudence.

III. This Court Should Resolve The Question Presented Now And In This Case.

After the Second Circuit decided *Anderson*, the debtor, represented by the same counsel as respondent here, urged this Court not to grant certiorari on the ground that the textual arguments in that case had been waived, and that the Second Circuit had not yet had an opportunity to address this Court's decision in *Epic*. *See* Brief In Opposition To Petition For Writ Of Certiorari at 25-26, 29, *Credit One Bank, N.A., v. Anderson*, 139 S. Ct. 144 (Mem.) (2018) (No. 17-1652).

Those issues are now fully litigated and are squarely presented for review. The Second Circuit has conclusively held that its purpose-based approach is good law both before and after *Epic*. *See* Pet. App. 7a-9a. Only this Court can resolve that issue and it should grant certiorari to make clear to the lower courts that the Bankruptcy Code is not exempt from Congress's—and this Court's—requirement that arbitration agreements should be enforced unless Congress clearly and manifestly commands otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

October 9, 2020

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals
For the Second Circuit

August Term 2019

Argued: April 21, 2020
Decided: June 16, 2020

Nos. 19-648 (L), 19-655 (Con.)

IN RE: NYREE BELTON, KIMBERLY BRUCE,

Debtors.

NYREE BELTON,

Plaintiff-Appellee,

KIMBERLY BRUCE,

Debtor-Appellee,

v.

GE CAPITAL RETAIL BANK,

Defendant-Appellant,

CITIGROUP INC., CITIBANK, N.A.,

Appellants.

Appeal from the United States District Court
for the Southern District of New York
Nos. 15-cv-1934, 15-cv-3311,
Vincent L. Briccetti, *Judge*.

Before: WINTER, WESLEY, AND SULLIVAN, *Circuit Judges*.

Appellants GE Capital Retail Bank, Citigroup Inc., and Citibank, N.A. appeal from an order of the district court (Briccetti, *J.*) denying Appellants' motions to compel arbitration. Specifically, Appellants argue that Appellees – two debtors who previously held credit card accounts managed by Appellants – were obliged to arbitrate a dispute concerning whether Appellants violated the bankruptcy court's discharge orders when they failed to correct the status of Appellees' credit card debt on their credit reports. Both the bankruptcy court and the district court determined that the arbitration clauses in the credit card agreements were unenforceable. On appeal, we conclude that though the text and history of the Bankruptcy Code are ambiguous as to whether Congress intended to displace the Federal Arbitration Act in this context, our precedent is clear that the two statutes are in inherent conflict on this issue. We therefore affirm the district court's order.

AFFIRMED AND REMANDED.

GEORGE F. CARPINELLO (Adam R. Shaw, Anne M. Nardacci, *on the brief*), Boies Schiller Flexner LLP, Albany, NY; Charles Juntikka, Charles Juntikka & Associates LLP, New York, NY, *for* Appellees.

JOSEPH L. NOGA, Jenner & Block LLP, New York, NY; Matthew S. Hellman, Jenner & Block LLP, Washington, DC, *for* Appellant GE Capital Retail Bank.

BENJAMIN R. NAGIN (Eamon P. Joyce, Jonathan W. Muenz, Qais Ghafary, *on the brief*), Sidley Austin LLP, New York, NY, *for* Appellants Citigroup Inc. and Citibank, N.A.

RICHARD J. SULLIVAN, *Circuit Judge*:

Is the alleged violation of a bankruptcy court discharge order an arbitrable dispute? Though we answered this very question only two years ago, we are called upon to reconsider the issue here. If we were writing on a blank slate, perhaps our conclusion would be different. But as our Court's precedent is clear, and as that precedent is not incompatible with intervening caselaw or the text and history of the Bankruptcy Code, we are bound to answer the question in the negative. Accordingly, we AFFIRM the order of the district court (Briccetti, *J.*) affirming the decision of the bankruptcy court (Drain, *Bankr. J.*) denying Appellants' motions to compel arbitration.

I. Background

Appellants GE Capital Retail Bank ("GE"), Citigroup Inc., and Citibank, N.A. (together, "Citi" and, collectively with GE, the "Banks") appeal the district court's order and judgment affirming the bankruptcy court's denial of the Banks' motions to compel arbitration. In 2007, Appellees Nyree Belton and Kimberly Bruce (together, the "Debtors") opened credit card accounts with GE and Citi, respectively. Unfortunately, the Debtors quickly fell behind on their credit card debt and began to miss payments. The Banks eventually "charged off" that delinquent debt – changing

its accounting treatment from a receivable to a loss – and sold it to third-party consumer debt purchasers. The Banks also reported the change in the debt's status to the three major credit reporting agencies. In turn, those agencies updated the Debtors' credit reports to reflect the debt as "charged off," indicating that the debt was severely delinquent but still outstanding.

Within the next few years, both Debtors filed voluntary petitions for relief under Chapter 7 of the Bankruptcy Code (the "Code"). At the completion of the liquidation processes, the bankruptcy court entered orders discharging the Debtors' debts. Under 11 U.S.C. § 524(a)(2), those orders operate as "injunction[s]" against any future collection attempts.

Nevertheless, after the Debtors emerged from bankruptcy, their credit reports continued to reflect their credit card debt as "charged off" without any mention of the bankruptcy discharge. The Debtors assert that this was not a simple mistake, but rather an attempt by the Banks to coerce the Debtors into repaying the debt notwithstanding the bankruptcy court's orders. As a result, the Debtors, purporting to represent a nationwide class of similarly situated debtors, reopened their bankruptcy cases and initiated adversary proceedings against the Banks, alleging that the Banks' refusal to update their credit reports violated the bankruptcy court's orders and the associated injunctions provided by section 524(a)(2). The Debtors seek a contempt citation and damages.

In response, the Banks moved to enforce mandatory arbitration clauses in the Debtors' credit card account agreements. Ultimately, both the bankruptcy court and

the district court rejected the Banks' motions, finding that the dispute was not arbitrable due to an inherent conflict between the Code and the Federal Arbitration Act (the "Arbitration Act"). The Banks appealed.

II. Jurisdiction & Standard of Review

We have jurisdiction to decide this case under 28 U.S.C. § 158(d) and 9 U.S.C. § 16(a)(1). As for the applicable standard of review, "[t]he rulings of a district court acting as an appellate court in a bankruptcy case are subject to plenary review." *Stoltz v. Brattleboro Hous. Auth.* (*In re Stoltz*), 315 F.3d 80, 87 (2d Cir. 2002). In other words, "[w]hen reviewing a bankruptcy court decision that was subsequently appealed to a district court, we review the bankruptcy court's decision independent of the district court's review." *Statek Corp. v. Dev. Specialists, Inc.* (*In re Coudert Bros. LLP*), 673 F.3d 180, 186 (2d Cir. 2012). In so doing, we review the bankruptcy court's legal conclusions *de novo*. *ANZ Sec., Inc. v. Giddens* (*In re Lehman Bros. Inc.*), 808 F.3d 942, 946 (2d Cir. 2015).

III. Discussion

We are called upon to decide a narrow issue: whether a dispute concerning the violation of a bankruptcy discharge order is arbitrable.[1]

The Arbitration Act requires courts to strictly enforce arbitration agreements. But like any statutory directive, that mandate may be overridden by contrary congressional intent. *Shearson/American Express, Inc.*

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[1] As discussed below, our decision does not address whether such a dispute is amenable to class adjudication.

v. McMahon, 482 U.S. 220, 226 (1987). Such an intent may be deduced from "the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *Id.* at 227 (internal quotation marks, citation, and alteration omitted).

Employing the *McMahon* test here requires us to exhaustively parse the Code in search of such congressional intent. But we are not writing on a blank slate. In 2018, this Court considered a nearly identical dispute in *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), 884 F.3d 382 (2d Cir.), *cert. denied*, 139 S. Ct. 144 (2018). Like this case, *Anderson* concerned a credit card account holder seeking to bring an adversary proceeding against a bank for violating a bankruptcy discharge order. And like the account agreements here, the agreement in *Anderson* contained a mandatory arbitration provision.

The *Anderson* Court nevertheless refused to enforce the parties' arbitration agreement, finding that Congress did not intend for disputes over the violation of a discharge order to be arbitrable. The Court reached that conclusion by determining that arbitration was in "inherent conflict" with enforcement of a discharge order because: (1) the discharge injunction is "integral" to the bankruptcy process; (2) "the claim [concerns] an ongoing bankruptcy matter that requires continuing court supervision;" and (3) "the equitable powers of the bankruptcy court to enforce its own injunctions are central to the structure of the Code." *Id.* at 390. Importantly, the Court arrived at this holding without considering the Code's text or legislative history, which

the parties had not argued before the district court. *Id.* at 388–89.

Given the overwhelming similarities between this case and *Anderson*, our hands seem to be bound by that panel's decision. *See Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016). But the Banks tell us otherwise.

According to them, the Supreme Court's recent decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), undermined *Anderson*'s interpretation of *McMahon* and its progeny. Specifically, they argue that *Epic Systems* rejected the notion that an inherent conflict between statutory purpose and arbitration is independently sufficient to displace the Arbitration Act. The Banks instead see *Epic Systems* as requiring a text-first approach that cannot be satisfied by reference only to statutory purpose.

We disagree. To be sure, *Epic Systems* describes an exacting gauntlet through which a party must run to demonstrate congressional intent to displace the Arbitration Act. *See id.* at 1624 ("A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." (internal quotation marks omitted)). But despite the difference in tone, "the test [*Epic Systems*] employs is substantially the same as *McMahon*'s." *Henry v. Educ. Fin. Serv.* (*In re Henry*), 944 F.3d 587, 592 (5th Cir. 2019). More to the point, *Epic Systems* never stated an intention to overrule *McMahon* or render any prong of its tripartite test a dead letter. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Shalala v.*

Ill. Council on Long Term Care Inc., 529 U.S. 1, 18 (2000) (acknowledging that the Court "does not normally overturn, or . . . dramatically limit, earlier authority *sub silentio*").

What, then, is the impact of *Epic Systems* on *McMahon* (and thus *Anderson*)? Like the Fifth Circuit, we see *Epic Systems* as clarifying that where two of *McMahon*'s factors clash, a court should resolve the dispute in favor of the statutory text and any contextual clues derived therefrom. *See Henry*, 944 F.3d at 592. But that gloss on *McMahon* does not undermine *Anderson*'s conclusion – that an "inherent conflict" is sufficient to displace the Arbitration Act where the statutory text is ambiguous.

Of course, *Anderson*'s survival does not end our inquiry. *Anderson*, by virtue of the posture in which it arrived before the panel, was narrowly circumscribed. Specifically, the parties had waived any arguments concerning the Code's text or legislative history, and the Court declined to consider them. *Anderson*, 884 F.3d at 388–89. That is not the case here. We must therefore reexamine *Anderson*'s conclusion in light of the Code's text and history, and *Epic Systems*'s reminder that a statute's purpose cannot circumvent its text.

Here, no one disputes that the Code is silent on the issue of arbitration in this context. The contested question is what to make of that fact. *Epic Systems* clearly viewed statutory silence as probative evidence that Congress did not intend to displace the Arbitration Act. *See* 138 S. Ct. at 1626 (noting that "Congress has . . . shown that it knows how to override the Arbitration Act when it wishes"). But it did not treat silence as outcome

determinative – since that would have rendered much of *Epic Systems*'s analysis surplusage. Accordingly, we do not think that the Code's failure to expressly disclaim arbitrability undermines *Anderson*'s conclusion.

The Banks do, however, have one textual argument with some teeth: state courts have concurrent jurisdiction to enforce the discharge injunction as an affirmative defense in collections suits. *See Taggart v. Lorenzen*, 139 S. Ct. 1795, 1803 (2019). The Banks sensibly posit that if state courts are competent to interpret the scope of a discharge order, then so too are arbitrators. *See Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1157 n.11 (3d Cir. 1989) ("Where Congress has specifically indicated subjugation of arbitration to the dictates of the bankruptcy laws in one situation, but not in another, we must presume that Congress neither intended to subjugate arbitration in the second instance, nor saw the two laws as conflicting in this respect.").

But what the Banks overlook is that the Debtors are not invoking the discharge injunction as a defense to collection. Rather, they are proceeding affirmatively to recover damages for an alleged violation of a court order and injunction. Because our Court has never identified a private right of action under section 524, the Debtors have pursued this remedy through a contempt proceeding. *See Garfield v. Ocwen Loan Servicing, LLC*, 811 F.3d 86, 91–92, 92 n.7 (2d Cir. 2016); *Yaghobi v. Robinson*, 145 F. App'x 697, 699 (2d Cir. 2005). And as this Court and numerous other circuits have concluded, the only court that may offer a contempt remedy is the court that issued the discharge order – the bankruptcy

court. *See Anderson*, 884 F.3d at 391 (recognizing that "the bankruptcy court alone has the power to enforce the discharge injunction in Section 524" through a contempt citation); *accord Crocker v. Navient Sols., L.L.C.* (*In re Crocker*), 941 F.3d 206, 216–17 (5th Cir. 2019); *Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958, 970 (11th Cir. 2012); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 509-10 (9th Cir. 2002); *Cox v. Zale Del., Inc.*, 239 F.3d 910, 916–17 (7th Cir. 2001) (Posner, *J.*).

As a result, we conclude that the Code's text offers little guidance on Congress's intentions in the context of contempt proceedings like those at issue here. We further find that the legislative history of the relevant provisions is similarly unenlightening. We are therefore left with *Anderson*'s conclusion that the Code is in "inherent conflict" with arbitration. And under this Circuit's precedent, that is enough to displace the Arbitration Act. *See Anderson*, 884 F.3d at 389–92; *see also MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006) (citing *Ins. Co. of N. Am. v. NGC Settlement Tr. & Asbestos Claims Mgmt. Corp.* (*In re Nat'l Gypsum Co.*), 118 F.3d 1056, 1069 (5th Cir. 1997)); *U.S. Lines, Inc. v. American Steamship Owners Mut. Prot. & Indem. Assoc., Inc.* (*In re U.S. Lines, Inc.*), 197 F.3d 631, 640–41 (2d Cir. 1999). Accordingly, we are bound to affirm the district court's judgment.

* * *

Having determined that *Anderson* controls the issue before us, we pause only to offer a few words concerning the scope of that conclusion. Specifically, we have not endeavored to address whether a nationwide class action is a permissible vehicle for adjudicating thousands of

contempt proceedings, and neither our decision today nor *Anderson* should be read as a tacit endorsement of such.

Indeed, permitting a bankruptcy court to adjudicate compliance with another court's order appears to be in severe tension with *Anderson*'s reasoning. In particular, *Anderson* found that the Code displaced the Arbitration Act, in part, because contempt proceedings involve considerations that the issuing court is uniquely positioned to assess. *See* 884 F.3d at 390–91 ("[T]he bankruptcy court retains a unique expertise in interpreting its own injunctions and determining when they have been violated."). It seems to us that this rationale is anathema to a nationwide class action.[2]

More fundamentally, we question whether a bankruptcy court would even have jurisdiction to hold a creditor in contempt of another court's order. Most circuits that have considered the issue have rejected the notion. *See Crocker*, 941 F.3d at 216–17 ("We adopt the language of [*Anderson*] that returning to the issuing bankruptcy court to enforce an injunction is required at least in order to uphold 'respect for judicial process.'"); *Alderwoods Grp.*, 682 F.3d at 970 ("[T]he court that issued the injunctive order alone possesses the power to enforce compliance with and punish contempt of that order."); *Walls*, 276 F.3d at 509–10 (same); *Cox*, 239 F.3d at 916–17 (same); *but see Bassette v. Avco Fin. Servs.*,

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[2] To be sure, *Anderson* noted that "the class action nature" of the case did not alter the Court's conclusion. 884 F.3d at 391. But we read that language to refer to the Court's holding that the claims were not arbitrable, not to the unpresented issue of class certification and bankruptcy court jurisdiction.

Inc., 230 F.3d 439, 446 (1st Cir. 2000) (holding that a debtor is not required to "bring her claims in the court that issued the original discharge order").[3] And those cases are buttressed by the Supreme Court's recent decision in *Taggart*, which made clear that the contempt powers provided under sections 524(a)(2) and 105(a) "bring with them the 'old soil' that has long governed how courts enforce injunctions." 139 S. Ct. at 1802.

So, while we affirm the district court's judgment, we leave for another day the issue of class certification.

IV. Conclusion

Accordingly, we **AFFIRM** the order of the district court and **REMAND** for further proceedings consistent with this opinion. The Debtors' motion for summary affirmance is **DENIED** as moot.

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[3] But even in *Bassette*, on remand, the District of Rhode Island found that its jurisdiction was limited to "claims that are related to bankruptcy estates in the District of Rhode Island," and refused to certify a nationwide class. *Bassette v. Avco Fin. Servs., Inc.*, 279 B.R. 442, 449 (D.R.I. 2002).

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	
NYREE BELTON,	:	**OPINION**
Debtor.	:	**AND ORDER**
NYREE BELTON, Debtor and Plaintiff on behalf of herself and all others similarly situated,	:	15 CV 1934 (VB)
Plaintiff,	:	
v.	:	
GE CAPITAL CONSUMER LENDING, INC. a/k/a GE MONEY BANK,	:	
Defendant.	:	
In re:	:	
KIMBERLY BRUCE,	:	
Debtor.	:	
KIMBERLY BRUCE, Debtor and Plaintiff on behalf of herself and all others similarly situated,	:	
Plaintiff,	:	15 CV 3311 (VB)
v.	:	

CITIGROUP INC., CITIBANK, N.A., and CITIBANK (SOUTH DAKOTA), N.A., Defendants. :

Briccetti, J.:

Plaintiffs-appellees Nyree Belton and Kimberly Bruce move under Fed. R. Civ. P. 59(e) and 60(b) and Southern District of New York Local Civil Rule 6.3 for reconsideration of this Court's October 14, 2015, Memorandum Decision reversing the order of the United States Bankruptcy Court for the Southern District of New York (Drain, J.) denying defendants-appellants GE Capital Retail Bank ("GE"), Citigroup Inc., and Citibank, N.A., successor-in-interest to Citibank (South Dakota), N.A.'s (together, "Citi") motions to compel arbitration under the Federal Arbitration Act ("FAA"). (*In re Belton*, 15 Civ. 1934 (Doc. #37) (S.D.N.Y.); *In re Bruce*, 15 Civ. 3311 (Doc. #30) (S.D.N.Y.)).

For the following reasons, plaintiffs-appellees' motions are GRANTED.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 158(a).

BACKGROUND

The Court assumes familiarity with the underlying factual background and summarizes only the relevant procedural history.

On November 10, 2014, the Bankruptcy Court issued an order denying GE's motion to compel arbitration in

In re Belton, Adv. Proc. No. 14-8223 (Bankr. S.D.N.Y.), for reasons set forth in a "Corrected and Modified Bench Ruling" issued the same day. *See In re Belton*, 2014 WL 5819586 (Bankr. S.D.N.Y. Nov. 10, 2014). Two days later, the Bankruptcy Court denied Citi's motion to compel arbitration in *In re Bruce*, Adv. Proc. No. 14-8224, substantially for the reasons stated in its Corrected and Modified Bench Ruling in *In re Belton*. GE and Citi appealed the Bankruptcy Court's decisions to this Court.

On October 14, 2015, this Court issued a Memorandum Decision (the "October 14 Decision") reversing the Bankruptcy Court's orders in *In re Belton* and *In re Bruce* and remanding the cases to the Bankruptcy Court with instructions to grant the respective motions to compel and stay the adversary proceedings pending arbitration, and for further proceedings consistent with the Memorandum Decision. *In re Belton*, 2015 WL 6163083, at *10 (S.D.N.Y. Oct. 14, 2015) (Briccetti, J.). This Court subsequently denied plaintiffs-appellees' motions to certify the October 14 Decision for interlocutory appeal. *In re Belton*, 2016 WL 164620, at *2 (S.D.N.Y. Jan. 12, 2016).

On March 17, 2016, plaintiffs-appellees filed in the Court of Appeals for the Second Circuit petitions for writs of mandamus to vacate the October 14 Decision.

Separately, on May 14, 2015, the Bankruptcy Court issued an order denying a motion to compel arbitration in *Anderson v. Credit One Bank, N.A.*, Adv. Proc. No. 15-8214 (Bankr. S.D.N.Y.). On June 14, 2016, the Honorable Nelson S. Román affirmed the Bankruptcy Court's order. *In re Anderson*, 553 B.R. 221 (S.D.N.Y.

2016), *aff'd*, 884 F.3d 382 (2d Cir. 2018), *cert. denied sub nom. Credit One Bank, N.A. v. Anderson*, 139 S. Ct. 144 (Mem) (Oct. 1, 2018).

In light of Judge Román's decision in *In re Anderson*, on August 16, 2016, plaintiffs-appellees filed "renewed" motions to certify this Court's October 14 Decision for interlocutory appeal. (*In re Belton*, 15 Civ. 1934 (Doc. #32); *In re Bruce*, 15 Civ. 3311 (Doc. #25)). This Court denied the motions.

Subsequently, on December 15, 2016, the Second Circuit stayed plaintiffs-appellees' petitions for writs of mandamus in *In re Bruce* and *In re Belton* "pending a ruling in *In re Anderson*." Motion Order, *In re Bruce*, No. 16-830 (Dkt. 69) (2d Cir. Dec. 15, 2016); Motion Order, *In re Belton*, No. 16-833 (Dkt. 68) (2d Cir. Dec. 15, 2016).

On March 7, 2018, the Second Circuit affirmed Judge Román's decision in *In re Anderson*. The Circuit then issued orders in *In re Bruce* and *In re Belton* denying plaintiffs-appellees' mandamus petitions, because in each case, "Petitioner can seek the requested relief by moving in the district court for reconsideration of its order in light of this Court's decision in *In re Anderson*." Order, *In re Bruce*, No. 16-830 (Dkt. 96) (2d Cir. June 26, 2018); Order, *In re Belton*, No. 16-833 (Dkt. 96) (2d Cir. June 26, 2018).

Thereafter, plaintiffs-appellees filed the instant motions for reconsideration.

DISCUSSION

I. Legal Standard

Plaintiffs-appellees bring the present motions for reconsideration under Fed. R. Civ. P. 59(e) and 60(b) and SDNY Local Civil Rule 6.3. GE argues those rules do not apply because the Court already remanded the instant cases to the Bankruptcy Court, and because Fed. R. Civ. P. 59(e) and 60(b) apply only to appealable orders. Moreover, GE argues Fed. R. Bankr. P. 8022, which governs motions for rehearing filed in bankruptcy appeals before the district court, does not apply because the Court already remanded the cases, and because Fed. R. Bankr. P. 8022(b) requires motions for rehearing to be filed within fourteen days of entry of judgment on appeal.

The Court need not decide the precise legal basis for entertaining the instant motions for reconsideration. GE acknowledges the Court has the authority to reconsider its own decision. Moreover, an intervening change of controlling law is a near-universally valid basis for bringing a motion for reconsideration. *See*, *e.g.*, *Kroemer v. Tantillo*, 2018 WL 6619850, at *3 (2d Cir. Dec. 17, 2018) (summary order) (motion to alter or amend judgment under Fed. R. Civ. P. 59(e)); *Ayazi v. United Fed'n of Teachers Local 2*, 487 F. App'x 680, 681 (2d Cir. 2012) (summary order) (Fed. R. Civ. P. 60(b)); *Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 90 (2d Cir. 1996) (recalling mandate); *Raymond v. Mid-Bronx Haulage Corp.*, 2017 WL 9882601, at *1 (S.D.N.Y. June 10, 2017) (Fed. R. Civ. P. 54(b)); *In re Parade Place*,

LLC, 508 B.R. 863, 869 (Bankr. S.D.N.Y. May 2, 2014) (S.D.N.Y. Local Bankr. R. 9023–1(a)).[1]

Generally, such a motion should be granted only when the Court has overlooked facts or precedent that might have altered the conclusion reached in the earlier decision. *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *see* SDNY Local Civil Rule 6.3. The motion must be "narrowly construed and strictly applied in order to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court." *Range Rd. Music, Inc., v. Music Sales Corp.*, 90 F. Supp. 2d 390, 391–92 (S.D.N.Y. 2000). Further, the motion "may not advance new facts, issues, or arguments not previously presented to the court." *Randell v. United States*, 64 F.3d 101, 109 (2d Cir. 1995) (citing *Morse/Diesel, Inc. v. Fid. & Deposit Co. of Md.*, 768 F. Supp. 115, 116 (S.D.N.Y. 1991)). This limitation ensures finality and "prevent[s] the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *Carolco Pictures Inc. v. Sirota*, 700 F. Supp. 169, 170 (S.D.N.Y. 1988) (internal quotation omitted). Mere disagreement with the Court's decision is not a basis for reconsideration. *Pro Bono Invs., Inc.*

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[1] GE argues the Court should apply the legal standard set forth in *Sargent v. Columbia Forest Products, Inc.*, in which the Second Circuit articulated a four-factor test for determining whether to recall a prior-issued mandate. 75 F.3d at 90. For substantially the reasons set forth below, reconsideration is warranted under the *Sargent* standard as well.

v. Gerry, 2008 WL 2354366, at *1 (S.D.N.Y. June 9, 2008) (collecting cases).

II. Application

Plaintiffs-appellees argue the Court should grant reconsideration of the October 14 Decision because the Second Circuit's opinion in *In re Anderson*, represents an intervening change of controlling law.

The Court agrees.

The October 14 Decision and *In re Anderson* dealt with the same issue. In both cases, the plaintiffs brought claims under 11 U.S.C. § 524(a)(2) alleging defendants violated the Bankruptcy Code's discharge injunction by deliberately failing to inform credit reporting agencies about the discharge of debts in bankruptcy to coerce former debtors into paying discharged debts. *In re Anderson*, 884 F.3d at 387; *In re Belton*, 2015 WL 6163083, at *2. In both cases, the defendants moved to compel arbitration. *In re Anderson*, 884 F.3d at 387; *In re Belton*, 2015 WL 6163083, at *2. And in both cases, the plaintiffs contested arbitrability by arguing there was an inherent conflict between arbitration of the Section 524 claims and the Bankruptcy Code. *In re Anderson*, 884 F.3d at 389; *In re Belton*, 2015 WL 6163083, at *6–7.

This Court and the Second Circuit reached opposite conclusions. In the October 14 Decision, this Court held Congress did not intend to preclude arbitration of claims under 11 U.S.C. § 524(a)(2) for violations of a discharge injunction. *In re Belton*, 2015 WL 6163083, at *9. In so doing, the Court held, among other things, there was no inherent conflict between the FAA and

Section 524 because "arbitrating plaintiffs-appellees' Section 524 claims would neither necessarily nor seriously jeopardize the objectives of that section or of the Bankruptcy Code in general." *Id.* at *7. On the other hand, in *In re Anderson*, the Second Circuit held "arbitration of a claim based on an alleged violation of Section 524(a)(2) would 'seriously jeopardize a particular core bankruptcy proceeding'" and thus create an inherent conflict with the Bankruptcy Code. *In re Anderson*, 884 F.3d at 389–90 (quoting *In re U.S. Lines, Inc.*, 197 F.3d 631, 641 (2d Cir. 1999)).

Moreover, the Second Circuit's orders clearly indicate the Circuit considers *In re Anderson* to affect the disposition of this case. The Circuit stayed plaintiffs-appellees' petitions for writs of mandamus "pending a ruling in *In re Anderson*," Motion Order, *In re Bruce*, No. 16-830 (Dkt. 69) (2d Cir. Dec. 15, 2016); Motion Order, *In re Belton*, No. 16-833 (Dkt. 68) (2d Cir. Dec. 15, 2016), and ultimately denied the petitions specifically because plaintiffs-appellees could seek reconsideration of the October 14 Decision "in light of" *In re Anderson*. *See* Order, *In re Bruce*, No. 16-830 (Dkt. 96) (2d Cir. June 26, 2018); Order, *In re Belton*, No. 16-833 (Dkt. 96) (2d Cir. June 26, 2018). Therefore, *In re Anderson* represents an intervening change of controlling law.

Defendants-appellants argue *In re Anderson* does not represent an intervening change of controlling law because the Second Circuit declined to address the Bankruptcy Code's text and legislative history, whereas this Court found the Bankruptcy Code's text and legislative history weighed against the conclusion that

Congress intended to preclude arbitration of Section 524 claims. However, as this Court held in its October 14 Decision, "the Court may look to the Bankruptcy Code's text, its legislative history, '*or* [to] an inherent conflict between arbitration and the [Code]'s underlying purposes'" to decide whether Congress intended to preclude arbitration of Section 524 claims. *In re Belton*, 2015 WL 6163083, at *5 (quoting *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (emphasis added)) (alterations in original); *see also In re Anderson*, 884 F.3d at 388 ("Congressional intent may be discerned through the 'text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes.'" (quoting *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. at 227)). Thus, the fact that the Second Circuit declined to address the Bankruptcy Code's text and legislative history does not detract from *In re Anderson*'s precedential value in this case.

Defendants-appellants also argue *In re Anderson* is inconsistent with the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). In that case, the Supreme Court held Section 7 of the National Labor Relations Act ("NLRA"), which guarantees workers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," did not displace the FAA and outlaw arbitration agreements requiring individualized arbitration. *Id.* at 1619, 1624 (quoting 29 U.S.C. § 157).

Defendants-appellants argue both that (i) the Supreme Court conducted a text-first analysis in *Epic Systems Corp. v. Lewis* that contradicts the Second Circuit's inherent conflict approach in *In re Anderson*, and (ii) the inherent conflict approach is no longer viable post- *Epic Systems Corp. v. Lewis*—essentially the same argument this Court rejected in the October 14 Decision, when defendants-appellants argued the inherent conflict approach was no longer viable post-*CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012). *See In re Belton*, 2015 WL 6163083, at *5.

Neither argument is persuasive. "[T]he Second Circuit has spoken directly to the issue presented by this case, and this Court is required to follow that decision 'unless and until it is overruled in a precedential opinion by the Second Circuit itself or unless a subsequent decision of the Supreme Court so undermines it that it will almost inevitably be overruled by the Second Circuit.'" *United States v. Diaz*, 122 F. Supp. 3d 165, 179 (S.D.N.Y. 2015), *aff'd*, 854 F.3d 197 (2d Cir. 2017). The Supreme Court did not "so undermine[]" the inherent conflict test such that *In re Anderson* will almost inevitably be overruled by the Second Circuit. *Id.* Indeed, that the Circuit has continued to apply the inherent conflict test even after the Supreme Court bypassed it in multiple cases suggests the Circuit is not inclined to abandon the inherent conflict test until the Supreme Court more explicitly abrogates it.

Finally, defendants-appellants argue the Court should refuse to grant reconsideration of the October 14 Decision because plaintiffs-appellees were dilatory in failing to pursue arbitration in the three years since the

decision. The Court disagrees. Plaintiffs-appellees were not dilatory. On December 15, 2016, the Second Circuit issued orders staying plaintiffs-appellees petitions for writs of mandamus "pending a ruling in *In re Anderson*." Motion Order, *In re Bruce*, No. 16-830 (Dkt. 69) (2d Cir. Dec. 15, 2016); Motion Order, *In re Belton*, No. 16-833 (Dkt. 68) (2d Cir. Dec. 15, 2016). Plaintiffs-appellees were well within their rights to wait for the Second Circuit's decision on their requests for writs of mandamus before commencing arbitration.

CONCLUSION

The motions for reconsideration are GRANTED.

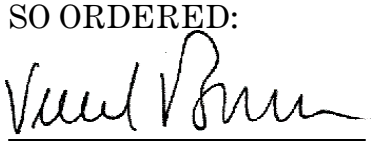
This Court's October 14, 2015, Memorandum Decision, and the order to remand contained therein, are VACATED.

The Bankruptcy Court's orders denying defendants-appellants' motions to compel arbitration are AFFIRMED. The Bankruptcy Court is directed to conduct further proceedings consistent with this Opinion and Order.

The Clerk is instructed to terminate the motions. (*In re Belton*, 15 Civ. 1934 (Doc. #37); *In re Bruce*, 15 Civ. 3311 (Doc. #30)).

Dated: March 4, 2019
White Plains, NY

SO ORDERED:



Vincent L. Briccetti

United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	
NYREE BELTON,	:	**MEMORANDUM**
Debtor.	:	**DECISION**
NYREE BELTON, Debtor and Plaintiff on behalf of herself and all others similarly situated,	:	15 CV 1934 (VB)
Plaintiff,	:	
v.	:	
GE CAPITAL CONSUMER LENDING, INC. a/k/a GE MONEY BANK,	:	
Defendant.	:	
In re:	:	
	:	
KIMBERLY BRUCE,	:	
Debtor.	:	
KIMBERLY BRUCE, Debtor and Plaintiff on behalf of herself and all others similarly situated,	:	15 CV 3311 (VB)
Plaintiff,	:	
v.	:	
	:	

CITIGROUP INC., CITIBANK, N.A., and CITIBANK (SOUTH DAKOTA), N.A., Defendants. :

Briccetti, J.:

In these related bankruptcy appeals, defendants-appellants GE Capital Retail Bank[1] ("GE"), as well as Citigroup Inc. and Citibank, N.A., successor-in-interest to Citibank (South Dakota), N.A. (together, "Citi"), appeal from orders of the United States Bankruptcy Court for the Southern District of New York (Drain, J.) denying their respective motions to compel arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*.

For the following reasons, the Bankruptcy Court's orders are REVERSED.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 158(a).

BACKGROUND

In 2007, plaintiffs-appellees Nyree Belton and Kimberly Bruce each opened credit card accounts; Belton opened an account with GE, and Bruce opened an account with Citi. Both Belton's credit card agreement with GE and Bruce's credit card agreement with Citi contain arbitration provisions. The arbitration

[1] GE Capital Retail Bank was formerly known as GE Money Bank, which is named in the *Belton* case caption as an "also known as" for GE Capital Consumer Lending, Inc.

provision in Belton's agreement provides, in relevant part: "[A]ny past, present or future legal dispute or claim of any kind, including statutory and common law claims and claims for equitable relief, that relates in any way to your account, card or your relationship with us ('Claim') will be resolved by binding arbitration if either you or we elect to arbitrate." (*Belton* A112).[2] Bruce's agreement similarly states: "All Claims [defined as 'any claim, dispute, or controversy between you and us'] relating to your account, a prior related account, or our relationship are subject to arbitration." (*Bruce* A444). Both credit card agreements also have provisions discussing credit reporting, including the process for cardholders to follow if they believe defendants-appellants have provided "inaccurate" or "erroneous" information to credit reporting agencies. (*Belton* A112; *Bruce* A442).

In May 2012, Belton filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. Bruce did the same in January 2013. Both petitions were filed in the United States Bankruptcy Court for the Southern District of New York.

The Bankruptcy Court eventually entered a discharge order in each case, thereby closing the cases and discharging plaintiffs-appellees' debts. Among their discharged debts were debts they incurred with their GE and Citi credit cards, respectively.

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[2] "*Belton* A___" and "*Bruce* A___" refer to the appendices submitted in these appeals.

In October 2012, after receiving her discharge, Belton obtained her credit report from Equifax, a credit reporting agency. The credit report included an entry, or "tradeline," for her GE credit card account. That account was listed as "charged off," which, according to plaintiffs-appellees, means a "debt [i]s currently due and owing." (Pls.' Br. at 4). The credit report gave no indication Belton's credit card debt had been discharged in bankruptcy.

Similarly, when Bruce obtained her credit report in September 2013, the report described her Citi credit card debt as "charged-off" rather than as having been discharged in bankruptcy.

In 2014, plaintiffs-appellees moved to re-open their bankruptcy cases. After the motions were granted, they each commenced a putative class action adversary proceeding. Plaintiffs-appellees allege defendants-appellants, as a matter of policy and practice, deliberately fail to inform credit reporting agencies about the discharge of debts in bankruptcy because former debtors will often pay discharged debts to have them removed from their credit reports. Defendants-appellants allegedly profit from debtors paying off discharged debts by (i) selling those debts, as well as information related thereto, to buyers who are willing to pay more for them because of the likelihood the debts will be paid off; and (ii) receiving a percentage—in some cases 100 percent—of each repaid debt. Plaintiffs-appellees allege defendants-appellants' practices violate the Bankruptcy Code's discharge injunction, which provides that a discharge order "operates as an injunction against . . . an act, to collect, recover or offset

any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). Plaintiffs-appellees seek, among other relief, to have defendants-appellants held in contempt for willfully violating discharge orders.

On June 30 and July 3, 2014, Citi and GE, respectively, moved to compel arbitration of the claims against them and to stay the adversary proceedings pending arbitration.

While its motion was pending, GE had Belton's discharged credit card debt removed from her credit report. Citi likewise had Bruce's discharged debt removed from her credit report.

In October 2014, the United States Trustee filed an application in Belton's re-opened bankruptcy case for an order authorizing the Trustee to conduct an examination of GE pursuant to Rule 2004 of the Federal Rules of Bankruptcy.[3] Specifically, the Trustee sought to serve a subpoena duces tecum on GE and to compel a GE representative to answer oral questions. The Trustee filed a similar application in Bruce's bankruptcy case in December 2014. The Bankruptcy Court granted both applications in January 2015.

On November 10, 2014, the Bankruptcy Court issued an order denying GE's motion to compel arbitration. (*Belton* A684). The Bankruptcy Court set forth its reasons for doing so in a "Corrected and Modified Bench

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[3] A Rule 2004 examination is a "very broad," "pre-litigation" discovery process designed "to assist the trustee in revealing the nature and extent of the estate, ascertaining assets, and discovering whether any wrongdoing has occurred." *In re Corso*, 328 B.R. 375, 383 (E.D.N.Y. 2005) (internal quotation marks omitted).

Ruling" issued the same day. *See In re Belton*, 2014 WL 5819586 (Bankr. S.D.N.Y. Nov. 10, 2014). Two days later, on November 12, 2014, the Bankruptcy Court issued an order denying Citi's motion to compel arbitration substantially for the reasons stated in its Corrected and Modified Bench Ruling. (*Bruce* A620).

Defendants-appellants sought leave to appeal those orders directly to the United States Court of Appeals for the Second Circuit, which denied their applications on March 3 and April 7, 2015, respectively. Accordingly, GE filed the pending appeal in this Court on March 13, 2015, and Citi did so on April 28, 2015.

DISCUSSION

I. Standard of Review

A district court "may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree." Fed. R. Bankr. P. 8013. A district court reviews a bankruptcy court's conclusions of law *de novo* and its findings of fact under a clearly erroneous standard. *See In re Ames Dep't Stores, Inc.*, 582 F.3d 422, 426 (2d Cir. 2009) (citing *Momentum Mfg. Corp. v. Emp. Creditors Comm.*, 25 F.3d 1132, 1136 (2d Cir. 1994)).

II. Arbitrability of Plaintiffs-Appellees' Claims

The FAA provides, in relevant part: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The statute reflects a "liberal

federal policy favoring arbitration," *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (internal quotation marks omitted), and establishes a "preference for enforcing arbitration agreements . . . even when the claims at issue are federal statutory claims." *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 486 (2d Cir. 2013).

In deciding whether to compel arbitration, "a court must consider (1) whether the parties have entered into a valid agreement to arbitrate, and, if so, (2) whether the dispute at issue comes within the scope of the arbitration agreement." *In re Am. Express Fin. Advisors Secs. Litig.*, 672 F.3d 113, 128 (2d Cir. 2011). And when any of claims at issue arise under a federal statute, the court must also determine whether Congress intended such federal statutory claims to be arbitrated, and whether arbitration would "prevent the 'effective vindication' of [the] federal statutory right." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013).

Although the Bankruptcy Court ultimately denied defendants-appellants' motions to compel arbitration, it concluded the parties' arbitration agreements were valid and covered plaintiffs-appellees' claims. Plaintiffs-appellees challenge those rulings on appeal.

Accordingly, the Court first considers whether the arbitration agreements are valid.

A. Validity of Arbitration Agreements

Plaintiffs-appellees contend their bankruptcy discharges rendered their arbitration agreements

unenforceable.[4] According to plaintiffs-appellees, their discharges relieved them of *all* of their obligations under their credit card agreements—including their obligation to arbitrate.

However, in *MBNA America Bank, N.A. v. Hill*, the Second Circuit enforced an arbitration clause even though the plaintiff had already been granted a discharge. 436 F.3d 104, 106, 110-11 (2d Cir. 2006). *Hill* thus appears to foreclose plaintiffs-appellees' argument.

In any event, Supreme Court precedent makes clear that "a party's challenge to . . . [a] contract *as a whole*, does not prevent a court from enforcing a specific agreement to arbitrate." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (emphasis added). "That is because § 2 [of the FAA] states that a 'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' *without mention* of the validity of the contract in which it is contained." *Id.* Indeed, "[a]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Id.* at 70-71. Thus, an arbitration agreement may be declared unenforceable *only* when a party "challenges specifically the validity of the agreement to arbitrate," as opposed to the validity of the entire contract. *Id.* at 70 (internal quotation marks omitted).

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[4] Although plaintiffs-appellees include this argument in a section of their brief discussing the scope of the arbitration agreements (Pls.' Br. at 38-41), this argument assails the validity, rather than the scope, of the arbitration agreements.

Here, plaintiff-appellees do not make any arguments about why their agreements to arbitrate, in and of themselves, are unenforceable; rather, they attack the enforceability of their credit card agreements as a whole. Plaintiffs-appellees therefore have failed to show their arbitration agreements are invalid under *Jackson*.

Accordingly, the Court next considers whether plaintiffs-appellees' claims fall within the scope of their arbitration agreements.

B. Scope of Arbitration Agreements

Plaintiffs-appellees contend their claims exceed the scope of their respective arbitration agreements because those agreements apply only to claims or disputes between the parties, whereas the claims here are, in effect, between defendants-appellants and the Bankruptcy Court. As plaintiffs-appellees explain, these actions seek to hold defendants-appellants in contempt for violating the Bankruptcy Court's discharge orders, meaning, in plaintiffs-appellees' view, "the Bankruptcy Court itself is a party to each action, since it is the Bankruptcy Court's injunction that has allegedly been violated and it is the Bankruptcy Court's . . . powers that provide the means through which the violation can be remedied." (Pls.' Br. at 39).

But "[i]n determining whether a particular claim falls within the scope of the parties' arbitration agreement," the Court focuses "on the factual allegations in the complaint rather than the legal causes of action asserted." *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987). "If the allegations underlying the claims 'touch matters' covered by the parties [credit

card] agreements, then those claims must be arbitrated, whatever the legal labels attached to them." *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 n.13 (1985)).

Plaintiffs-appellees allege defendants-appellants deliberately failed to remove discharged debts, or have discharged debts removed, from plaintiffs-appellees' credit reports. The parties' credit card agreements specifically discuss credit reporting, including the process for plaintiffs-appellees to follow if they believe defendants-appellants have provided "inaccurate" or "erroneous" information to credit reporting agencies. (*Belton* A112; *Bruce* A442). Thus, the factual allegations underlying plaintiffs-appellants' claims clearly "touch matters" covered by their credit card agreements.

Accordingly, irrespective of the relief plaintiffs-appellees seek or the means by which they hope to obtain such relief, their claims fall within the scope of their arbitration agreements.

Having concluded the arbitration agreements are valid and cover the claims asserted here, the Court next considers whether Congress intended claims under Section 524 to be arbitrable.

C. Congressional Intent to Preclude Arbitration of Section 524 Claims

As noted above, the FAA establishes a "preference for enforcing arbitration agreements." *Parisi v. Goldman, Sachs & Co.*, 710 F.3d at 486. The statute thus generally "requires courts to enforce agreements to arbitrate according to their terms . . . even when the claims at issue are federal statutory claims."

CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012). But "the FAA's mandate [may be] overridden" if the federal statute alleged to have been violated contains "a contrary congressional command," *id.* (internal quotation marks omitted), that is, if the statute evinces Congress' intent to have courts, not arbitrators, decide claims arising under the statute. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). "The party opposing arbitration has the burden of showing that Congress intended to preclude arbitration of the statutory rights at issue." *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d at 108.

The parties disagree about how to ascertain whether Congress intended to foreclose arbitration of discharge injunction claims under Section 524. Plaintiffs-appellees contend this intent may be divined "from [the Bankruptcy Code's] text or legislative history, or from an inherent conflict between arbitration and the [Code]'s underlying purposes," as set forth in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. at 227 (internal citation and quotation marks omitted). (Pls.' Br. at 15, 22). Defendants-appellants maintain the Supreme Court's recent decision in *CompuCredit Corp. v. Greenwood*, which considered whether the Credit Repair Organizations Act ("CROA") prohibits arbitration of claims made thereunder, requires plaintiffs-appellees to identify "explicit statutory language" exempting their claims from arbitration; a statute's legislative history or an "inherent conflict" is not enough. (GE Br. at 18; *accord* Citi Br. at 10 (federal statutory claims must be arbitrated "in the

absence of an express contradiction in the text of the statute")).

The Court agrees with plaintiffs-appellees. Although *CompuCredit* held CROA claims are subject to arbitration "[b]ecause the CROA is silent on whether claims under the Act can proceed in an arbitrable forum," 132 S. Ct. at 673, *CompuCredit* cannot be read as impliedly overruling *McMahon*, particularly given that *CompuCredit* cites *McMahon* for the proposition that the FAA may be "overridden by a contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. at 669 (internal quotation marks omitted). Indeed, Justices Sotomayor and Kagan, who concurred in the judgment in *CompuCredit*, did "not understand the majority opinion to hold that Congress must speak so explicitly in order to convey its intent to preclude arbitration of statutory claims. We have never said as much, and on numerous occasions have held that proof of Congress' intent may also be discovered in the history or purpose of the statute in question." *Id.* at 675 (Sotomayor and Kagan, J.J., concurring). And, as plaintiffs-appellees point out, in arguing that the CROA overrode the FAA, respondents in *CompuCredit* did not rely on the CROA's legislative history, nor did they make an "inherent conflict" argument; "[c]onsequently, the sole question for the Court [wa]s whether the text of the CROA precludes arbitration with sufficient clarity to override the operation of the FAA." (Pls.' Br. at 24 (quoting petitioners' brief in *CompuCredit*, 2011 WL 2533009, at *18 (June 23, 2011))).

Accordingly, in deciding whether Congress intended to preclude arbitration of Section 524 claims, the Court

may look to the Bankruptcy Code's text, its legislative history, "*or* [to] an inherent conflict between arbitration and the [Code]'s underlying purposes." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. at 227 (emphasis added). That said, "[t]hroughout such an inquiry, it should be kept in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 26 (internal quotation mark omitted).

1. Text and Legislative History

Neither Section 524, nor the Bankruptcy Code in general, expressly mentions arbitration.

28 U.S.C. § 1334 does, however, discuss jurisdiction over bankruptcy-related matters. The statute provides, in relevant part, that federal district courts "have original *but not exclusive* jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11," 28 U.S.C. § 1334(b) (emphasis added), but retain exclusive jurisdiction over "claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327."[5] *Id.* § 1334(e)(2).

By declining to give district courts exclusive jurisdiction over most bankruptcy-related civil

[5] Section 327 of the Bankruptcy Code addresses the retention and compensation of professionals, such as attorneys, accountants, appraisers, and auctioneers, in connection with a bankruptcy proceeding.

proceedings, Section 1334(b) on its face appears to permit arbitration of such proceedings. *See MBNA Am. Bank, N.A. v. Hill*, 436 F.3d at 110 (citing Section 1334 and noting that "[a]rbitration is presumptively an appropriate and competent forum for federal statutory claims" and that litigation of claims under the Bankruptcy Code's automatic stay provision "is not a matter within the exclusive jurisdiction of the bankruptcy courts").

And to the extent it can be argued that a grant of exclusive jurisdiction over certain claims provides some evidence of Congress' intent to preclude arbitration of those claims,[6] the fact that in subsection (e)(2) of Section 1334 Congress vested district courts with exclusive jurisdiction over Section 327 claims—but not Section 524 claims—cuts against the conclusion that Congress intended to exempt Section 524 claims from arbitration. *See Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1157 n.11 (3d Cir. 1989) ("Where Congress has specifically indicated subjugation of arbitration to the dictates of the bankruptcy laws in one situation, but not in another, we must presume that Congress neither intended to subjugate arbitration in the second instance, nor saw the two laws as conflicting in this respect."). Congress added subsection (e)(2) in

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[6] In *McMahon*, the Supreme Court held that claims under Section 10(b) of the Securities Exchange Act are subject to arbitration even though the statute grants district courts exclusive jurisdiction over such claims. 482 U.S. at 227-28. The dissent pointed out, however, that "the limitation of § 10(b) actions to federal court argues *against* enforcing predispute arbitration agreements as to such actions." *Id.* at 245 n.2 (Blackmun, J., dissenting).

2005, after "a string of [Supreme] Court[] decisions compelling arbitration pursuant to contractual stipulations . . . [had] alerted Congress to the utility of drafting anti[-arbitration] prescriptions with meticulous care." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. at 669 (Ginsburg, J., dissenting). Thus, had Congress intended to give federal courts exclusive jurisdiction over Section 524 claims, or otherwise express its intent to preclude arbitration of those claims, it knew how to do so.

Accordingly, text and legislative history weigh against the conclusion that Congress intended to preclude arbitration of Section 524 claims.

2. Inherent Conflict

An "inherent conflict" exists between the FAA and a provision of the Bankruptcy Code if arbitrating a claim arising under that provision would "necessarily" and "seriously" jeopardize the Code's objectives, which include "the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d at 108-09 (internal quotation marks omitted). Determining whether arbitration of a claim would necessarily and seriously jeopardize the Code's objectives "requires a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy." *Id.* at 108. Only if a "severe conflict" is found can a court "properly conclude that, with respect to the particular Code provision involved, Congress intended to override the Arbitration Act's general policy

favoring the enforcement of arbitration agreements." *Id.*

Here, arbitrating plaintiffs-appellees' Section 524 claims would neither necessarily nor seriously jeopardize the objectives of that section or of the Bankruptcy Code in general.

The Bankruptcy Court concluded plaintiffs-appellees' Section 524 claims should not be arbitrated principally because giving the debtor a "fresh start" is the most fundamental objective of the Bankruptcy Code; the discharge injunction secures that objective; and, therefore, allowing an arbitrator rather than a bankruptcy court to adjudicate a claim for violation of the discharge injunction would seriously undermine that objective. *See In re Belton*, 2014 WL 5819586, at *8.

But the fact that a plaintiff alleges a violation of an important, even fundamental, Bankruptcy Code provision is not enough to exempt such a claim from arbitration. In *MBNA America Bank, N.A. v. Hill*, the Second Circuit compelled arbitration of a putative class action adversary proceeding alleging violations of the Bankruptcy Code's automatic stay provision, even though the court recognized "the automatic stay is surely an important provision of the Bankruptcy Code." 436 F.3d at 110; *accord Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) ("The automatic stay provision . . . has been described as one of the fundamental debtor protections provided by the bankruptcy laws." (internal quotation marks omitted)). Indeed, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an

arbitral, rather than a judicial, forum." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 26 (internal quotation marks omitted).

The Bankruptcy Court misread *Hill* as "articulat[ing] in very strong dicta that when the debtor's fresh start is at issue, an enforcement proceeding in the bankruptcy court should not be stayed in favor of arbitration." *In re Belton*, 2014 WL 5819586, at *8. In *Hill*, the Second Circuit held that arbitration of the plaintiff's automatic stay claim would not seriously jeopardize the objectives of the Bankruptcy Code, "[f]irst, and most importantly," because the plaintiff had received a discharge and, therefore, "no longer require[d] the protection of the stay to ensure her fresh start." 436 F.3d at 110. The Bankruptcy Court interpreted *Hill* as suggesting that, had the stay been necessary to ensure the plaintiff's fresh start, arbitration would not have been appropriate; and because the discharge injunction is necessary to obtain a fresh start, the reasoning goes, *Hill* should be viewed as cautioning against arbitration of actions to enforce that injunction.

But *Hill* cannot be construed as supporting the notion that arbitration is unavailable whenever "the debtor's fresh start is at issue." *In re Belton*, 2014 WL 5819586, at *8. *Hill* stands for the more modest proposition that claims alleging violations of the Bankruptcy Code should not be arbitrated if those claims are "integral to [the] bankruptcy court's ability to preserve and equitably distribute assets of the estate" or if arbitration would "substantially interfere with [the debtor's] efforts to reorganize." 436 F.3d at 110 (internal

quotation marks omitted). Conversely, under *Hill*, arbitration of claims under the Bankruptcy Code *is* required when "arbitration would not interfere with or affect the distribution of the estate" or would not "affect an ongoing reorganization," as was the case there. *Id.* at 109-10.

In support of the latter proposition, *Hill* cited *Bigelow v. Green Tree Financial Servicing Corp.*, 2000 WL 33596476 (E.D. Cal. Nov. 30, 2000), a case in which the court compelled arbitration of the plaintiff's claims—including a claim for violation of the discharge injunction under Section 524—because the claims did "not address the liquidation of the estate nor the priority of creditor's claims." *Id.* at *6. The court therefore "perceive[d] no adverse effect on the underlying purposes of the code from enforcing arbitration." *Id.* The same reasoning applies here. Because arbitration of plaintiffs-appellees' Section 524 claims "would not interfere with or affect the distribution of the estate" and would not "affect an ongoing reorganization," it cannot be said arbitration would necessarily or seriously jeopardize the objectives of the Bankruptcy Code in this case. *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d at 109-10.

Hill's two other bases for holding that arbitration of the plaintiff's automatic stay claim would not seriously jeopardize the objectives of the Bankruptcy Code apply equally here as well.

The Second Circuit observed that "the fact Hill filed her [automatic stay] claim as a putative class action" weighed in favor of compelling arbitration. *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d at 110. "By tying her claim to a class of allegedly similarly situated individuals,

many of whom are no longer in bankruptcy proceedings," the court explained, Hill "demonstrate[d] the lack of a close connection between the claim and her own underlying bankruptcy case." *Id.* In other words, bringing her claim as part of a putative class action underscored the fact that the claim was not "integral" to her own bankruptcy case. *Id.*; *cf. In re U.S. Lines, Inc.*, 197 F.3d 631, 641 (2d Cir. 1999) (reversing order compelling arbitration of declaratory judgment proceedings because they were "integral to the bankruptcy court's ability to preserve and equitably distribute the Trust's assets"). The same goes here for plaintiffs-appellees.

The Second Circuit in *Hill* also relied on the fact that the bankruptcy court was not "uniquely able to interpret and enforce" the automatic stay provision. 436 F.3d at 110. The court noted that "[a]rbitration is presumptively an appropriate and competent forum for federal statutory claims," *id.*, and there was nothing to suggest the bankruptcy court was more qualified than an arbitrator to adjudicate a claim alleging violations of the automatic stay.

Similarly here, a discharge order "is a form, a national form, which is issued in every case when there is, in fact, a discharge"; it is "not a handcrafted order." *In re Haynes*, 2014 WL 3608891, at *8 (Bankr. S.D.N.Y. July 22, 2014). Accordingly, the Bankruptcy Court is not "uniquely able to interpret and enforce" such an order. *MBNA Am. Bank v. Hill*, 436 F.3d at 110. This point is only reinforced by the fact that plaintiffs-appellees have brought putative class actions asking one bankruptcy court to enforce the discharge orders of many other

bankruptcy courts. Arbitration of plaintiffs-appellees' Section 524 claims therefore would not necessarily or seriously jeopardize the goal of having bankruptcy courts enforce their own orders. *Id.* at 108.

In short, *Hill* does not support denial of defendants-appellants' motions to compel.

Plaintiffs-appellees also contend that arbitrating their claims would necessarily and seriously jeopardize the Bankruptcy Code's goal of avoiding piecemeal litigation. *See MBNA Am. Bank v. Hill*, 436 F.3d at 108. As plaintiffs-appellees argue, the United States Trustee has "intervened in these cases" to conduct examinations pursuant to Federal Rule of Bankruptcy Procedure 2004, but the Trustee is obviously not a party to their arbitration agreements; thus, because "[t]he Trustee's actions cannot be arbitrated . . . the granting of Defendants-Appellants' motions would lead to duplicative proceedings." (Pls.' Br. at 37-38).

Although the Trustee has intervened in plaintiffs-appellees' *bankruptcy* cases, the Trustee has not joined in the adversary proceedings that defendants-appellants seek to arbitrate. Indeed, as the Bankruptcy Court noted, the Trustee is conducting a "separate inquiry" that is "not really tied to" the adversary proceedings. (*Bruce* A775). Sending the adversary proceedings to arbitration therefore will not create any more duplicative proceedings than already exist.

Accordingly, plaintiffs-appellees have failed to meet their burden of showing Congress intended to preclude arbitration of Section 524 claims.

The Court therefore will next consider whether arbitration would "prevent the 'effective vindication' of" plaintiffs-appellees' right to the fresh start secured by the discharge injunction. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. at 2310.

D. Effective Vindication Doctrine

The "effective vindication" doctrine "originated as dictum" in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, a case in which the Supreme Court "expressed a willingness to invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. at 2310 (alterations and internal quotation marks omitted). "[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," the Court observed, "the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 637.

As the Supreme Court made clear in *Italian Colors*, the doctrine will only invalidate an agreement that eliminates "the right to pursue" a federal remedy, such as an agreement "forbidding the assertion of certain statutory rights" or imposing "filing and administrative fees . . . that are so high as to make access to the [arbitral] forum impracticable." 133 S. Ct. at 2310-11. When "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000).

Although the Bankruptcy Court concluded there was a "risk" the costs of arbitration here would "make access to the [arbitral] forum impracticable," *In re Belton*, 2014 WL 5819586, at *9, the record is devoid of facts "showing the likelihood" such costs would actually be incurred. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. at 92. The costs of arbitration here therefore cannot serve as a basis for invalidating the arbitration agreements.

The Bankruptcy Court also expressed concern about "the ability of an arbitration panel to grant timely . . . [and] effective relief." *In re Belton*, 2014 WL 5819586, at *10. The inability to grant timely relief, however, is not tantamount to "the elimination of the *right to pursue*" a federal statutory remedy. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. at 2311 (emphasis in original). In any event, plaintiffs-appellees' discharged debts have been removed from their credit reports, thus mitigating the need for urgent action. *Cf. In re Belton*, 2014 WL 5819586, at *10 ("[E]very day that a credit report is inaccurate is another day that the debtor believes she must pay her debt or be turned down for new credit."). And although the Bankruptcy Court doubted whether an arbitrator could render a final decision on any bankruptcy matters in light of the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (holding that a bankruptcy court lacks constitutional authority to make final determinations on certain types of core bankruptcy matters),[7] in *Wellness*

[7] As plaintiffs-appellees explain, "if the Bankruptcy Court does not even have the power to issue a final order on some bankruptcy matters, how could a non-Article III or a non-Article I arbitrator

International Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015), the Supreme Court held that bankruptcy judges could adjudicate all matters submitted to them on the parties' consent. The Court even noted that arbitration is a long-accepted method of resolving cases on consent. *Id.* at 1942.

Accordingly, arbitration of plaintiffs-appellees' Section 524 claims would not prevent the effective vindication of their right to a fresh start.

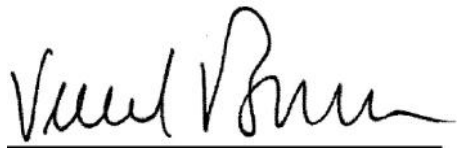
CONCLUSION

The Bankruptcy Court's orders denying defendants-appellants' motions to compel arbitration are REVERSED. These cases are REMANDED to the Bankruptcy Court with instructions to grant the respective motions to compel and stay the adversary proceedings pending arbitration, and for further proceedings consistent with this Memorandum Decision.

The Clerk is instructed to close these cases.

Dated: October 14, 2015
White Plains, NY

SO ORDERED.



Vincent L. Briccetti
United States District Judge

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have more power to finally resolve bankruptcy matters." (Pls.' Br. at 32).

Appendix D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: NYREE BELTON, Debtor,	Case No. 12-23037 (RDD) Chapter 7
NYREE BELTON, Debtor and Plaintiff on behalf of herself and all others similarly situated, v. GE CAPITAL CONSUMER LENDING, INC., A/K/A GE MONEY BANK Defendant.	Adv. No. 14-08223 (RDD)

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION

Upon the motion (the "Motion"), on due notice, of defendant GE Capital Consumer Lending Inc. for an order compelling arbitration and staying this proceeding pursuant to 9 U.S.C. §§ 2-4; and upon plaintiff's objection to the Motion and all other pleadings filed in connection therewith; and upon the record of the hearings held by the Court on the Motion on September 11, 2014 and October 6, 2014; and, after due deliberation and for the

reasons stated in the Court's corrected and modified bench ruling, dated November 10, 2014, a copy of which is attached hereto, the Court having found and concluded that the plaintiff has sustained her burden in opposition and that the Motion should not be granted, it is hereby

ORDERED that the Motion is denied.

Dated: White Plains, New York
November 10, 2014

/s/ Robert D. Drain
United States
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	.	
	.	
NYREE BELTON,	.	Chapter 7
	.	Case No. 12-
Debtor.	.	23037 (RDD)
NYREE BELTON,	.	
	.	
Plaintiff,	.	
	.	
v.	.	Adv. P. No. 14-
	.	08223 (RDD)
GE CAPITAL CONSUMER LENDING, INC. A/K/A GE MONEY BANK,	.	
	.	
Defendant.	.	
	.	

CORRECTED AND MODIFIED BENCH RULING ON MOTION TO COMPEL ARBITRATION

APPEARANCES:

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Hon. Robert D. Drain, United States Bankruptcy Judge

In this adversary proceeding, the plaintiff, Ms. Belton seeks under 11 U.S.C. §§ 105(a) and 524, as well as by invoking the Court's inherent power to enforce and find parties in contempt for breach of its orders, to enforce the discharge of debt under section 727(a) of the Bankruptcy Code that she received at the end of her bankruptcy case. In addition to requesting relief on behalf of Ms. Belton, the adversary proceeding also seeks, pursuant to Fed. R. Bankr. P. 7023, to enforce the discharge on behalf of a class of all similarly situated debtors. (The Court previously addressed an issue raised by the complaint's request for class action relief

in a closely analogous proceeding, *Haynes v. Chase Bank USA* (*In re Haynes*), 2014 Bankr. LEXIS 3111 (Bankr. S.D.N.Y. July 22, 2014)).

The asserted factual basis for relief is that the defendant, GE Capital Consumer Lending, Inc. ("GE Capital"), while aware of Ms. Belton's discharge, did not correct one or more credit reports to show that her debt originally owed to GE Capital was, in fact, discharged in bankruptcy, instead permitting it to continue to be represented as outstanding. The complaint asserts that this was not a simple mistake by GE Capital but, rather, an attempt to enforce the debt notwithstanding its discharge.

The complaint asserts that when a credit report lists debt as not having been discharged in bankruptcy, the debtor's fresh start, and more particularly her ability to obtain credit in the future, including, for example, to buy a home, an automobile or engage in other substantial credit transactions, is materially impaired. As stated by the editors of the leading bankruptcy treatise,

> The failure to update a credit report to show that a debt has been discharged is also a violation of the discharge injunction if shown to be an attempt to collect the debt. Because debtors often feel compelled to pay debts listed in credit reports when entering into large transactions, such as a home purchase, it should not be difficult to show that the creditor, by leaving discharged debts on a credit report, despite failed attempts to have the creditor update the report, is attempting to collect the debt.

4 *Collier on Bankruptcy*, ¶ 524.02[2][b] (16th ed. 2014), at page 524-23; *see also In re Haynes*, 2014 Bankr. LEXIS 3111, *5, and the cases cited therein.

The complaint asserts that GE Capital has a concerted, widespread and profitable practice of not reporting debt to it as discharged in bankruptcy in order to pressure consumer debtors to clean up their credit reports by paying debt that, as a matter of law embodied in the discharge order, they do not have to pay.

The complaint's merits (which GE Capital disputes), are not presently at issue. Instead, what is before me is GE Capital's motion to stay this proceeding pursuant to section 3 of the Federal Arbitration Act, 9 U.S.C. §§ 1-15 (the "FAA"), and to compel arbitration of the dispute pursuant to sections 2 and 4 of the FAA.

The parties are party to an agreement, contained in Ms. Belton's credit card contract, which provides in relevant part, "Any legal dispute or claim of any kind, including statutory and common law claims and claims for equitable relief that relate in any way to your account, card, or your relationship with us will be resolved by binding arbitration if either you or we elect to arbitrate." The credit card agreement also contains a waiver of any class action remedy. Finally, it provides

> We [GE Capital] will pay all filing, administrative hearing and other fees the administrator or arbitrator charges up to $2,500. If the cost is higher, you can ask us to pay more and we will consider your request in good faith. Under all circumstances we will pay all amounts we are required to pay under applicable law.

Although the particular factual context of this motion raises issues that have not been directly addressed by the Second Circuit, or courts within the Circuit or by the Supreme Court, the general standard by which the Court should determine a motion to compel arbitration under the FAA is reasonably well-established.

The FAA "reflects a legislative recognition of the desirability of arbitration as an alternative to the complications of litigation. The Act, reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid the costliness and delays of litigation, and to place arbitration agreements upon the same footing as other contracts." *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 844 (2d Cir. 1987) (internal quotations and citations omitted). The FAA, and in particular section 2 thereof, which provides that a provision in a contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract," is "a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "This text reflects the overarching principle that arbitration is a matter of contract. And consistent with that text, courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted." *American Express Co. v. Italian Colors*

Restaurant, 133 S. Ct. 2304, 2309 (2013) (internal quotations and citations omitted). "That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *Id.* (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668-69 (2012)).

That being said, and consistent with the last clause of the foregoing quotation, courts, including the Supreme Court, have continued to recognize limitations on the enforceability of arbitration agreements under section 2 of the FAA and the related obligation, which is mandatory if the FAA applies, to stay proceedings pending before them in favor of arbitration pursuant to section 3 of the FAA.

Given the statutory directives in those two sections, a court asked to stay proceedings and compel arbitration in a case claimed to be covered by the FAA has essentially four tasks. First, it must determine whether the parties in fact agreed to arbitrate the dispute at issue. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Second, it must determine the scope of the parties' agreement to arbitrate and whether the agreement is revocable, "with a healthy regard for the federal policy favoring arbitration [such that] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." *Id. See also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) ("Although § 2's saving clause preserves generally applicable contract

defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006) (arbitrator, not court, should consider claim that entire contract, as opposed to arbitration provision itself, is void for illegality); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (federal case should be stayed under section 3 of FAA in favor arbitration unless arbitration provision, in contrast to contract in which it appears, is revocable).

Third, "[l]ike any statutory directive the [FAA's] mandate may be overridden by a contrary congressional command;" therefore, if federal statutory claims are asserted in the pending action, the Court must consider whether Congress intended those claims to be non-arbitrable. *Shearson/American Express v. McMahon*, 482 U.S. 220, 226-27 (1987). The burden is on the party opposing arbitration to establish such contrary congressional intent, which may be shown by the allegedly conflicting statute's text or legislative history to establish either an express or inherent conflict between arbitration and the statute's underlying purposes. *Id.*

Neither *McMahon* nor subsequent decisions equate this inquiry with determining whether Congress has impliedly repealed the FAA in the allegedly conflicting statute, which would require a finding that the two statutes are in "irreconcilable conflict, or where the latter act covers the whole subject of the earlier one and is clearly intended as a substitute." *Calcieri v. Salazar*, 555 U.S. 379, 395 (2009). A lesser showing of Congress'

express or inherent intent "to limit or prohibit waiver of a judicial forum for a particular claim . . . deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes" is required. *Shearson/American Express v. McMahon*, 482 U.S. at 227 (internal quotations and citations omitted). *See also CompuCredit Corp. v. Greenwood*, 132 S. Ct. at 675 (Sotomayor, J., concurring opinion); *United States Lines, Inc. v. American S.S. Owners Mut. Protection & Indem. Ass'n* (*In re United States Lines, Inc.*), 197 F.3d 631, 640 (2d Cir. 1999), *cert. denied*, 529 U.S. 1038 (2000) (arbitration clause should be enforced "unless [doing so] would seriously jeopardize the objectives of the [Bankruptcy] Code").

Related to both this point and the second inquiry to be undertaken, the Court may also refuse to enforce an arbitration agreement if it would prevent the "effective vindication of a statutory right." *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298 (2d Cir. 2013). However, in enforcing arbitration between corporations that had waived the right to class action relief, *Italian Colors Restaurant* also clarified that "the fact that it is not worth the expense involved in *proving* a statutory remedy [by arbitration] does not constitute the elimination of the *right to pursue* that remedy." 133 S. Ct. at 2311 (emphasis in the original). Thus, the "effective vindication" doctrine may now be limited to invalidating "a provision in an arbitration agreement forbidding the assertion of certain statutory rights . . . [and] would perhaps cover filing and

administrative fees attached to arbitration that are so high as to make *access to the forum* impractical." *Id.* at 2310-11 (emphasis added); *see also Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs would preclude a litigant . . . from effectively vindicating her federal statutory rights.").

Finally, if the Court concludes that some but not all of the claims are arbitrable, it must determine whether to stay the balance of the proceedings pending arbitration. *See generally Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 75-76 (2d Cir. 1998); *Bethlehem Steel Corp. v. Moran Towing Corp.* (*In re Bethlehem Steel Corp.*), 390 B.R. 784, 789 (Bankr. S.D.N.Y. 2008). In this proceeding, however, the plaintiff does not seek relief with the exception of enforcing her discharge under the Bankruptcy Code. The complaint does not invoke, for example, alleged breaches of the Fair Credit Reporting Act or other federal statutes or regulations. The Court therefore need not consider the fourth step of the foregoing analysis.

There is also no dispute regarding the terms of the arbitration provision in the credit card agreement at issue, which are broad, subjecting to arbitration "any. . .claim of any kind, including statutory . . . claims and claims for equitable relief, that relate in any way to [Ms. Belton's] account . . . or . . . relationship with [GE Captial]."

The parties disagree, however, over the scope of the arbitration provision -- or, rather, whether the parties could have intended it to cover a claim to enforce Ms. Belton's bankruptcy discharge. They also, perhaps more

aptly, dispute whether Congress intended a claim for the enforcement of a bankruptcy discharge to be non-arbitrable.

When a party seeks, as here, to compel arbitration in a bankruptcy context, both of these issues -- the scope of the arbitration agreement and whether Congress intended it to be superseded by the operation of the Bankruptcy Code and the bankruptcy court's jurisdiction -- are for a number of reasons often intertwined. This is because, as has long been recognized, bankruptcy proceedings raise several inherent conflicts with the policies and purposes of the FAA. That recognition, in the Second Circuit at least, goes back at least to *Bohack Corp. v. Truck Drivers Local Union No. 807, International Brotherhood of Teamsters*, 431 F. Supp. 646 (E.D.N.Y 1977), *aff'd*, 567 F.2d 237 (2d Cir. 1977), *cert. denied*, 439 U.S. 825 (1978), although it has been reiterated in many other decisions, as well, including *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006), and *In re United States Lines, Inc.*, 197 F.3d at 640.

Perhaps the most obvious conflict between the FAA and the Bankruptcy Code is that bankruptcy cases are predominantly collective, multi-party proceedings rather than two-party disputes. The debtor is often a mere stakeholder; thus, a prepetition agreement between the debtor and a creditor that includes an arbitration provision may not be said to cover disputes in a bankruptcy case that involve multiple new parties who did not agree, pre-bankruptcy to arbitration and who have a statutory right to intervene under section 1109(b) of the Code. This is compounded in disputes in which the

United States Trustee, who is given standing under section 307 of the Bankruptcy Code to "raise and . . . appear and be heard on any issue in any case or proceeding under [the Code]," decides to become involved. In such contexts, courts conclude that the two-party arbitration agreement does not extend to the dispute. *See generally In re Hostess Brands, Inc.*, 2013 Bankr. LEXIS 79 at *7-10 (Bankr. S.D.N.Y. Jan. 7, 2013), citing among such cases *Kraken Investments Ltd. v. Jacobs* (*In re Salander-O'Reilly Galleries, LLC*), in which District Judge Seibel stated, "[T]here is no justification for binding creditors to an arbitration clause with respect to claims that are not derivative of one who is a party to it." 475 B.R. 9, 24 (S.D.N.Y 2012) (citing *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1155 (3d Cir. 1989)); *see also* Note, "Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act," 117 Harv. L. Rev. 2296, 2302 (2004) (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002) ("It goes without saying that a contract [to arbitrate] cannot bind a non-party.")).

However, the multi-party nature of bankruptcy cases and proceedings is not the only clear conflict between the FAA and the Bankruptcy Code. It is, rather, indicative of a larger conflict inherent in the underlying structure of the Bankruptcy Code, in which Congress chose to stay and ultimately abrogate individual contract rights to enable the claims against the debtor and the debtor's assets to be assembled and determined in one forum under the supervision of one judge consistent with the Code's dictates, in contrast to piecemeal determinations

by other bodies, including different arbitration panels. This clear policy, implicit throughout the Bankruptcy Code and the related provisions of the Judicial Code that create the bankruptcy courts, differs from the mere conferral of jurisdiction on a court to decide a federal claim, which, as recognized in *CompuCredit v. Greenwood*, 132 S. Ct. at 670-71, is insufficient to override the FAA. In 28 U.S.C. §§ 1334(b) and 157(a)-(b), Congress granted specialized, though deep, jurisdiction to the bankruptcy courts over issues central to the bankruptcy process in the interests of efficiency, expertise and fairness. *Continental Ins. Co. v. Thorpe Insulation Co.* (*In re Thorpe Insulation Co.*), 671 F.3d 1011, 1022-23 (9th Cir. 2012), *cert. denied.*, 133 S. Ct. 119 (2012); *MBNA America Bank, N.A. v. Hill*, 436 F.3d at 108; *Phillips v. Congelton, L.L.C.* (*In re White Mining Co., L.L.C.*), 403 F.3d 164, 169-79 (4th Cir. 2005); *Ins. Co. of N. Am. v. NGC Settlement Trustee & Asbestos Claims Mgmt. Corp.* (*In re Nat'l Gympsum Co.*), 118 F.3d 1056, 1069 (5th Cir. 1997).

In light of that policy, courts have long held that when disputes pending before the bankruptcy court are at the core of the adjustment of debtor/creditor relations, whether as a matter of law or because of their importance to the conduct of the bankruptcy case, they should not be subject to arbitration. *Id.* Thus, recognizing the purely bankruptcy nature of the priority of a union's claims in bankruptcy, the Second Circuit in *Bohack* affirmed and adopted the District Court's opinion that such issues were not subject to arbitration, although the amount of the union's claims were properly arbitrable. 431 F. Supp. at 653-55, *aff'd*, 567 F.2d at 237.

And, recognizing the separate though related policy of efficiently managing bankruptcy cases in the bankruptcy court, the Second Circuit held in *In re United States Lines* that where declaratory judgment proceedings were integral to the bankruptcy court's ability to preserve and equitably distribute a post-reorganization trust's assets, arbitration was not required. 197 F.3d at 631. *See also Geron v. Cohen* 2013 U.S. Dist. 188737, *6-13 (S.D.N.Y. Mar. 21, 2013) (stay under section 3 of FAA properly denied where litigation over prepetition claim was "at the center of various causes of action in at least 37 filed adversary proceedings and many tolled actions in addition to Defendant's underlying proceeding"). As stated by the Fifth Circuit in holding that the bankruptcy court properly exercised its discretion not to stay under section 3 of the FAA an adversary proceeding to enforce a debtor's discharge,

> We think that, at least, where the cause of action at issue is not derivative of the pre-petition legal or equitable rights possessed by a debtor but rather is derived entirely from the federal rights conferred by the Bankruptcy Code, a bankruptcy court retains significant discretion to assess whether arbitration would be consistent with the purpose of the Code, including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders.

In re Nat'l Gypsum, 118 F.3d at 1069.

In contrast, it is clear that the Bankruptcy Code and the FAA do not conflict when the dispute at issue does not implicate core aspects of the adjustment of debtor/creditor relations but, instead, was and remains rooted in the pre-bankruptcy past. *Crysen/Montenay Energy Co. v. Shell Oil Co.* (*In re Crysen/Montenay Energy Co.*), 226 F.3d 160, 165-66 (2d Cir. 2000), *cert. denied*, 532 U.S. 920 (2001); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1161 (3d Cir. 1989)

At times it is not entirely clear whether courts have denied a request for a stay under section 3 of the FAA because they have concluded that arbitration would conflict with the Bankruptcy Code or, instead, based on their determination that the Bankruptcy Code so infuses the issue that the parties could not be said to have agreed to arbitrate it. One could argue, for example, that the purely bankruptcy issue of the extent and enforcement of a debtor's discharge, which frees the debtor from the personal imposition of a debt, could not have been intended by the parties to be covered by an arbitration provision in an agreement that gives rise to that very debt. Indeed, two courts have held that the issuance of the discharge removes an action to enforce the discharge from the ambit of an arbitration provision in the agreement that gave rise to the discharged debt. *See Harrier v. Verizon Wireless Communications*, 903 F. Supp. 2d 1281, 1283-84 (S.D. Fla. 2012), and *Jernstad v. Greentree Servicing, LLC*, 2012 U.S. Dist. LEXIS 108988, *5-6 (N.D. Ill. Aug. 2, 2012).

I conclude, however, like the court in *Mann v. Equifax Information Services, LLC*, 2012 U.S. Dist.

LEXIS 103210, *11-12 (E.D. Mich. May 24, 2013), that the better approach would be to analyze the issue through the lens of whether Congress intended in the Bankruptcy Code and related sections of the Judicial Code to render an action to enforce the discharge non-arbitrable.

I do that in part because I am persuaded that the discharge itself does not, in the words of Section 2 of the FAA, render the contract "revocable". The bankruptcy discharge frees the debtor from personal liability for pre-bankruptcy debts but does not eliminate all contractual obligations. For example, liens and leasehold interests ride through bankruptcy cases and may be enforced, *in rem*, if the debtor who has received the discharge does not continue to pay the underlying debt. *See generally Johnson v. Home State Bank*, 501 U.S. 78, 84-5 (1991); *In re Dabrowski*, 257 B.R. 394, 415 (Bankr. S.D.N.Y 2011).

It has also long been clear that rejection under section 365 of the Bankruptcy Code of a contract that includes an arbitration provision does not abrogate an obligation to arbitrate under such provision. *See Truck Drivers Local Union No. 807, International Brotherhood of Teamsters v. Bohack Corp.*, 541 F.2d 312, 321 n.15 (2d Cir. 1976); *see also Top Rank, Inc. V. Ortiz* (*In re Ortiz*), 400 B.R. 755, 762-63 (C.D. Cal. 2009).

Moreover, given the broad language of the arbitration provision here, it cannot be said that the parties clearly did not contemplate arbitration of all disputes related to the debt, including whether GE Capital has violated the discharge of that debt. *See Shearson/American Express v. McMahon*, 482 U.S. at

220, in which the Supreme Court held that Securities and Exchange Act and RICO claims, though arguably at best remotely contemplated when the parties agreed to arbitrate, were nevertheless covered by their arbitration agreement.

Given the strong policy in favor of arbitration, therefore, and Congress's use of the word "revocation" in Section 2 of the FAA, I believe that the fact that Ms. Belton's discharge is at issue as opposed to other claims does not remove the parties' agreement to arbitrate from the ambit of their present dispute.

That still leaves, however, the question whether Congress implicitly provided that this type of dispute not be subject to arbitration based on the policy conflicts of "near polar extremes" that often arise between the FAA and the Bankruptcy Code, described above. *MBNA America Bank, N.A. v. Hill*, 436 F.3d at 108.

To analyze that issue, the Second Circuit in *MBNA America Bank* adopted the following approach, which continues to govern today. First, "[b]ankruptcy courts generally do not have discretion to compel arbitration of 'non-core' bankruptcy matters [that is, matters not constituting core proceedings under 28 U.S.C. § 157(b)], or matters that are simply 'related to' bankruptcy cases. As to these matters, the presumption in favor of arbitration usually trumps the lesser interest of bankruptcy courts in adjudicating non-core proceedings." *Id.* (internal citations omitted). On the other hand, "[b]ankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters which implicate more pressing bankruptcy concerns. However, even as to core

proceedings, the bankruptcy court will not have discretion to override an arbitration agreement unless it finds that the proceedings are based on provisions of the Bankruptcy Code that inherently conflict with the [FAA] or that arbitration of the claim would necessarily jeopardize the objectives of the Bankruptcy Code. This determination requires a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy. The objectives of the Bankruptcy Code relevant to this inquiry include the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." Id. (internal quotations and citations omitted). *See also Koper v. Trinity Christian Ctr. of Santa Ana, Inc.* (*In re Koper*), 2014 Bankr. LEXIS 4168, *26-7 (Bankr. E.D.N.Y. Sept. 30, 2014) (asserted conflict must impinge upon a "substantially core" function of the bankruptcy process); *In re Hostess Brands, Inc.*, 2013 Bankr. LEXIS 79, *7-14 (Bankr. S.D.N.Y. Jan. 7, 2013) (same).

MBNA America Bank, N.A. v. Hill also provides considerable guidance, in strong dicta, on how to apply the foregoing analysis to the specific dispute before this Court, as do several decisions that directly address whether a bankruptcy court should decline to stay proceedings to enforce a debtor's discharge in light of a motion under section 3 of the FAA.

GE Capital contends that because the discharge issue is not a multi-party dispute, the Bankruptcy Code's centralization policy does not apply in favor of maintaining the bankruptcy court's jurisdiction. That is

true as far as it goes, but, as noted by the decisions cited above and discussed below, the conflict between the FAA and the Bankruptcy Code extends beyond protecting parties in interest who were not party to the underlying arbitration agreement; the Court may also properly refuse to stay a proceeding that is fundamental to the adjustment of the debtor/creditor relationship if to do otherwise would seriously impinge on a function that it has been established to carry out. *MBNA America Bank*, 436 F.3d at 108; *In re Nat'l Gypsum*, 118 F.3d at 1071 ("We are convinced that arbitration of a core bankruptcy adversary proceeding brought to determine whether [defendant's] collection efforts were barred by the section 524(a) discharge injunction . . . as a nondebtor-derivative action to enforce asserted rights created by the Bankruptcy Code that are completely divorced from [the debtor's] prepetition rights under the [defendant's agreement], would be inconsistent with the Bankruptcy Code.").

As noted by *Nat'l Gypsum*, 118 F.3d at 1070-71, the discharge is very clearly a fundamental, if not the fundamental, right obtained by a debtor in bankruptcy, whether the debtor is an individual or a corporation or other entity. *See also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007); *Schneiderman v. Bogdanovich* (*In re Bogdanovich*), 292 F.3d 104, 107 (2nd Cir. 2007).

Let me amplify on that point, because the language in the foregoing cases, albeit stating what those courts believe is an obvious proposition, nevertheless seems somewhat deracinated. This Court sees hundreds of individual debtors in bankruptcy every month, most of

them in Chapter 7 liquidations and in the Chapter 13 context where they are seeking to save their house or other valuable property subject to liens through an income payment plan lasting from three to five years, although I also see them in Chapter 11 cases (in fact, I confirmed one today). These cases are not easy for the debtors. Generally speaking, although there is nothing shameful in filing for bankruptcy relief -- it is a federally recognized right supported by ample policy reasons -- the vast majority of debtors view bankruptcy as a last resort and seriously regret having to invoke it.

When they file for bankruptcy relief, they subject themselves, moreover, to scrutiny of their financial condition at the most minute level. Congress has carefully enacted provisions of the Bankruptcy Code and Bankruptcy Rules to preclude those who do not fall into the category of the "honest but unfortunate debtor" from receiving a discharge of particular debts or an overall discharge, so that any creditor, in addition to being able to take essentially unfettered discovery of the debtor's financial condition under Bankruptcy Rule 2004, can also, if there is a basis, pursue the denial of his or her discharge or the dischargeability of a particular debt under sections 727(a) and 523(a) of the Bankruptcy Code, respectively.

Why then do debtors seek this relief, which subjects them to such scrutiny and the liquidation and distribution to their creditors, in a Chapter 7 case, of their non-exempt property, and, in Chapter 11 and Chapter 13 cases, of as much of their ongoing income as is required by those chapters of the Code? Why do they file a case in which, as is the practice in this district, at

least, Chapter 7 trustees will require them to turn over their engagement ring if that ring exceeds the value of the exemption, which is relatively small? Why? Because they need the discharge. The discharge is why they subject themselves to everything else. If a party subsequently violates the discharge, the debtor's reason for seeking relief and enduring all of the constraints imposed by Congress in the Bankruptcy Code go for nothing. Indeed, if the violation persists the case itself can be said to have been for nothing, which, of course, means that the effectiveness of bankruptcy as a fair, collective remedy for creditors and a fresh start for debtors is eviscerated.[1]

In other words, there is nothing more fundamental to bankruptcy relief than the discharge and its related fresh start. That policy underlies the Bankruptcy Code and Congress's determination, rooted in Article 1, Section 8 of the Constitution, that debtors should be able to discharge their debts and creditors should have the benefit of uniform bankruptcy laws premised on that ultimate quid pro quo. It is perhaps for this reason that every case, whether in its holding or in dicta, that has considered whether, standing alone, a proceeding to enforce the discharge is subject to arbitration under the FAA has concluded, to the contrary, that it is not

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[1] One could argue that the reporting of a discharged debt as still outstanding when the credit report also shows that the debtor has been in bankruptcy is even a worse result, indicating to those who are considering providing credit in the future that the debtor has fallen into the category of the dishonest debtor who did not receive a discharge.

properly arbitrable and that it should, instead, be determined by the bankruptcy court.

In addition to the three district court cases that I have already cited on the issue, *Harrier v. Verizon Wireless*, 903 F. Supp. 2d at 1283-84; *Jernstad v. Greentree Servicing, LLC*, 2012 U.S. Dist. LEXIS 108900 at *5-6; and *Mann v. Equifax Info. Servs*, 2013 U.S. Dist. LEXIS 103210 at *12-13, in which the court stated that if the debtor had been pursuing an action to enforce the discharge as opposed to an action primarily for relief under the Fair Credit Reporting Act, it too would have compelled the proceeding to go forward in federal court, the Fifth Circuit in *Nat'l Gypsum*, 118 F.3d 1056, held that a proceeding to determine the scope of and enforce a Chapter 11 debtor's discharge should be litigated in the bankruptcy court rather than in arbitration. *See also Hooks v. Acceptance Loan Co.*, 2011 U.S. Dist. LEXIS 76544, *14 (M.D. Ala. July 14, 2011) (stay under section 3 of FAA denied where action to enforce discharge was core and would interfere with the bankruptcy court's authority to enforce its orders); *Grant v. Cole* (*In re Grant*), 281 B.R. 721, 726 (Bankr. S.D. Ala. 2000) (same). *Cf. In re Koper*, 2014 Bankr. LEXIS 4168, *36-38 (denying FAA section 3 stay of non-dischargeability proceeding under section 523(a) of the Bankruptcy Code).

Moreover, the Second Circuit in *MBNA America Bank*, 436 F.3d at 104, articulated in very strong dicta that when the debtor's fresh start is at issue, an enforcement proceeding in the bankruptcy court should not be stayed in favor of arbitration. In that case, a debtor plaintiff sought the imposition of sanctions under

section 362(h) of the Bankruptcy Code for a creditor's alleged breach of the automatic stay under section 362(a) of the Code. The Circuit went out of its way to point out that since the proceeding had been commenced the debtor had received her discharge and therefore her fresh start. *Id.* at 110. In essence then, the debtor was looking only for money from the defendant. Moreover, these damages did not include the money that the defendant had allegedly withheld in breach of the automatic stay, because that sum had been repaid, but, rather, were the cost of seeking relief plus punitive sanctions for the plaintiff and a class of similarly-situated debtors. *Id.*

As the Circuit stated, "First, and most importantly, arbitration of Hill's § 362(h) claim would not jeopardize the important purposes that the automatic stay serves: providing debtors with a fresh start . . . ." Id. at 109. The decision goes on to list other purposes of the automatic stay: "protecting the assets of the estate and allowing the bankruptcy court to centralize disputes concerning the estate," *id.*; however, its first and fundamental purpose was to provide debtors with a fresh start. As the Circuit further stated,

> Hill's bankruptcy case is now closed and she has been discharged. Resolution of Hill's claim against MBNA therefore cannot affect an ongoing reorganization, and arbitration would not conflict with the objectives of the automatic stay. MBNA has reimbursed Hill for the $159.01 payment it extracted from her bank account, and Hill no longer requires the protection of the stay to ensure her fresh start.

Id. at 110.

From that language, it is clear that if the issue before me had been presented to the Second Circuit in the *MBNA America Bank* case, the Court would have denied the motion to compel arbitration, as did the Fifth Circuit in *In re Nat'l Gypsum Co.*, 118 F.3d at 1068-70.

Thus, although both the *MBNA* and *Nat'l Gypsum* cases hold that the mere fact that an issue before the Court is "core" under 28 U.S.C. § 157(b) will not compel the denial of a motion under section 3 of the FAA, requiring, instead, a case-by-case analysis of whether the issue is so fundamental to the Bankruptcy Code and its policies that it inherently conflicts with the FAA, they recognize that nothing is more fundamental to the adjustment of debtor/creditor relations than the discharge, an event that is not derived from the parties' pre-bankruptcy conduct but, rather, is the bankruptcy case's culminating event.

Given that Congress established the bankruptcy courts for this fundamental purpose, under the logic of the foregoing cases Ms. Belton should have to prove nothing more in order to defeat GE Capital's motion to compel arbitration. Nevertheless, other, lesser concerns support her objection to arbitration, as well. As noted by the Fifth Circuit in *Nat'l Gypsum*, "In the bankruptcy context, . . . efficient resolution of claims and conservation of the bankruptcy estate assets are integral purposes of the Bankruptcy Code. Accordingly, insofar as efficiency concerns might present a genuine conflict between the Federal Arbitration Act and the Code -- for example where substantial arbitration costs or severe delays would prejudice the rights of creditors

or the ability of a debtor to reorganize -- they may well represent legitimate considerations" against arbitration. 118 F.3d at 1069 n.21. Here, three such concerns exist.

As discussed above, although *American Express Company v. Italian Colors Restaurant*, 133 S. Ct. at 2304, limited the "effective vindication" doctrine, the Court nevertheless stated that it "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* at 2310-11, quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. at 90, for the proposition that "It may well be that the existence of large arbitration costs would preclude a litigant . . . from effectively vindicating her federal statutory rights."

The agreement at issue here provides for GE Capital's payment of the costs and fees of the arbitrator[s] up to $2,500, as well as recognizes the potential for greater liability, which, although there is no express attorneys' fees provision, could conceivably include attorneys' fees occasioned by GE Capital's breach of the discharge. In *Italian Colors*, the Court expressed its disagreement with applying the "effective vindication" doctrine in a way that would "require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the [parties]." 133 S. Ct. at 2311-12 (internal citation and quotations omitted). Is it not logical, however, as well as far from objectionable "tallying", to assume that Congress meant

debtors who have recently emerged from bankruptcy -- having had their assets liquidated with the exception of statutorily exempt property -- to gain free access to a court to enforce their discharge, rather than running the risk that they would have to pay for even a portion of the cost of an arbitration decision? I believe the answer to this question is clear, as is the risk that the arbitrator[s]' costs in the present dispute will exceed $2,500.

The timely and effective enforcement of the discharge also may be critically important for a debtor's fresh start, the difference between a debtor's resuming normal economic life and destitution. Accordingly, I asked the parties to brief whether rapid, equitable relief is available under the arbitration provision at issue here.

GE Capital correctly pointed out, first, that a year-and-a-half passed between the issuance of Ms. Belton's discharge and the commencement of this proceeding, arguing from this fact that there cannot be any urgency here. The complaint asserts, however, that Ms. Belton brought this action only after she learned that her credit report still reflected her debt as outstanding, and, in keeping with the fact that the discharge is an injunction, no debtor should have to wait any longer than is necessary to ensure that his or her discharge will be enforced. For example, if the complaint is correct, every day that a credit report is inaccurate is another day that the debtor believes she must pay her debt or be turned down for new credit. This raises two concerns -- the ability of an arbitration panel to grant timely relief and the ability of an arbitration panel to grant effective relief. Having considered the parties' arguments, I conclude that neither of these concerns is fully satisfied.

Thus, while it is reasonably clear that, under the arbitration rules applicable to the parties' agreement, one party may seek expedited relief through an emergency arbitrator requested to be appointed pending the appointment of the arbitration panel, there is bound to be delay and uncertainty regarding that procedure. Also, while it is generally accepted that arbitrators, particularly those acting under an arbitration provision like the one at issue here which recognizes the right to equitable relief, have the ability to award such relief, *see, e.g.*, *Next Step Medical Co., Inc. v. Johnson & Johnson* Int'l, 619 F.3d 67, 70 (1st Cir. 2010); *Sperry Int'l Trade, Inc. v. Gov't of Israel*, 689 F.2d 301, 303 (2d Cir. 1982); *Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City*, 606 F. Supp. 692, 693-94 (S.D.N.Y. 1985), and, although the issue is not entirely free from doubt, most would agree that the district courts, and presumably the bankruptcy courts, have the power to issue an injunction to preserve the status quo, at least, pending completion of an arbitration, *see, e.g.*, *Next Step Medical*, 619 F.3d at 70; *see also Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1377-80 (6th Cir. 1995) (citing cases), the procedure for obtaining injunctive relief again is uncertain and cumbersome, with enforcement power resting in the district court, not the arbitrator or arbitration panel that issued the decision. It is more likely that Congress intended the prompt and well established enforcement of the discharge to be left to a single bankruptcy judge who issued it. Whether the matter is resolved on the merits or, as is common in bankruptcy cases, settled, complete and consistent relief is more likely to occur if it is determined by -- and with the possible remedial

supervision of -- a bankruptcy court than on an arbitration-by-arbitration basis of separate alleged violations of the discharge. Indeed, this Court routinely handles such matters.

Finally, obtaining an effective remedy in arbitration (regardless whether the plaintiff or the defendant prevails) is today an open issue because of constitutional separation-of-powers concerns raised by at least three Courts of Appeal, although the Supreme Court may eventually render this concern moot.[2]

As the Supreme Court has often observed, "The FAA reflects the overarching principle that arbitration is a matter of contract." *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. at 2306. Thus, in section 2 of the FAA Congress required the determination by arbitrators, who do not have life tenure and whose salary is not protected by the Constitution -- indeed, who do not even have to be lawyers, let alone have to be judges -- of disputes that the parties consented to arbitrate; and, under section 3 of the FAA, Congress directed that federal courts stay proceedings pending before them if they are covered by such agreements. In addition, under section 10 of the FAA the courts' review of arbitrators' decisions is extremely limited, as recognized by countless federal courts, to instances where (a) the award was procured by corruption, fraud, or undue means, (b) where there was evident partiality or corruption in the arbitrators, or either of them, (c) where the arbitrators were guilty of misconduct in refusing to postpone the

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[2] The separation of powers issue was raised but not ruled on in *In re Nat'l Gypsum Co.*, 118 F.3d at 1071 n.26.

hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of a party have been prejudiced, or (d) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a).

This Court is acutely aware that following *Stern v. Marshall*, 131 S. Ct. 2594 (2011), three Courts of Appeal have held, based on separation-of-powers principles, that bankruptcy courts, whose decisions, of course, are subject to much more review than is provided in section 10 of the FAA -- and are, in fact, courts -- cannot render a final decision on matters submitted to them on consent if those matters do not implicate fundamental aspects of the adjustment of debtor/creditor relations. *See Frazin v. Haynes & Boone, L.L.P.* (*In re Frazin*), 732 F.3d 313, 320 n.3 (5th Cir. 2013); *Wellness Int'l Network Ltd. v. Sharif*, 727 F.3d 751, 768-72 (7th Cir. 2013), *cert. granted* in part on the issue of consent, 134 S. Ct 2901 (2014); and *Waldman v. Stone*, 698 F.3d 910, 917-18 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1604 (2013). Each of those decisions, deriving from a broad reading of *Stern*'s statement that "Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article," 131 S. Ct. at 2620, held that the fact that bankruptcy judges do not have life tenure and that their salaries are subject to congressional approval creates a sufficient non-waivable structural separation-of-powers concern that bankruptcy courts cannot decide matters on consent by final order.

To hold that, notwithstanding this reading of the Constitution, federal courts must, except for the reasons stated in section 10 of the FAA, do the bidding of arbitrators chosen on a piecemeal basis, without any tenure or salary protection (indeed, whose salary may be paid by only one of the parties) because Congress said so, boggles the mind. I believe that the faulty logic actually lies in the foregoing decisions, and hope that, as was said of the Aethelred the Unready, having begun in cruelty (or more aptly, amour-propre), and moved on to wretchedness, they will be overturned in disgrace. Until that happens, however, one cannot be assured that any ruling by an arbitration panel can be given the deference required by section 10 of the FAA, and instead must be subject to *de novo* review. On the other hand, it should be clear from *Stern* that this Court has the power to determine by final order fundamental issues historically pertaining to the adjustment of debtor/creditor relations, 131 S. Ct. at 2620; *see also id.* at 2621 (Scalia, J., concurring opinion); and as noted, nothing is more fundamental to the adjustment of debtor/creditor relations than the enforcement of a debtor's discharge.

Therefore, for all of the foregoing reasons, I conclude that GE Capital's motion should be denied. Counsel for the debtor should submit a proposed order to chambers consistent with this ruling.

Dated: White Plains, New York
November 10, 2014

/s/ Robert D. Drain
United States
Bankruptcy Judge

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

In re:

3/6/2019

NYREE BELTON,
Debtor.

----------X

NYREE BELTON, Debtor and Plaintiff on behalf of herself and all others similarly situated,
Plaintiff,

15 CIVIL 1934 (VB)

-against-

JUDGMENT

GE CAPITAL CONSUMER LENDING, INC. a/k/a GE MONEY BANK,
Defendant.

----------X

In re:

KIMBERLY BRUCE,
Debtor.

----------X

KIMBERLY BRUCE, Debtor and Plaintiff on Behalf of herself and all others similarly situated,
Plaintiff,

15 CIVIL 3311 (VB)

-against-

JUDGMENT

CITIGROUP INC., CITIBANK,
N.A., and CITIBANK
(SOUTH DAKOTA), N.A.,
Defendants.
----------X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated March 4, 2019, motions for reconsideration are granted; This Court's October 14, 2015, Memorandum Decision and Order to remand contained therein, are vacated; the Bankruptcy Court's orders denying defendants-appellants' motions to compel arbitration are affirmed; the Bankruptcy Court is directed to conduct further proceedings consistent with this Court's Opinion and Order.

Dated: New York, New York
March 6, 2019

RUBY J. KRAJICK

Clerk of Court

By:
/s/
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 3/6/2019